

No. 10340

United States
Circuit Court of Appeals
For the Ninth Circuit.

Vol
2331

UNITED STATES OF AMERICA,

Appellant,

vs.

PACIFIC FRUIT & PRODUCE COMPANY, a
corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Eastern District of Washington
Northern Division

FILED

FEB 24 1943

PAUL P. O'BRIEN,
CLERK

No. 10340

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,

vs.

PACIFIC FRUIT & PRODUCE COMPANY, a
corporation,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Eastern District of Washington
Northern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Answer	40
Appeal:	
Certificate of Clerk to Supplemental Transcript of	243
Certificate of Clerk to Transcript of Record on	236
Designation of Portions of Record to Constitute Record on.....	235
Designation of Record, Supplemental, on..	242
Notice of	230
Order Extending Time for Docketing Record on	231
Order Extending Time for Filing Transcript of Record on (CCA).....	232
Statement of Points on Which Appellant Intends to Rely on.....	233
Statement of Points on Which Appellant Intends to Rely on, Supplemental.....	240
Certificate of Clerk to Transcript of Record on Appeal	236

Index	Page
Certificate of Clerk to Transcript of Supplemental Transcript of Record.....	243
Complaint as Amended (Third Cause of Action) Exhibits:	2
11—Promissory Note, dated April 6, 1937, in the amount of \$165.00....	14
12—Promissory Note, dated April 22, 1937, in the amount of \$155.00....	16
13—Promissory Note, dated June 15, 1937, in the amount of \$230.00....	19
14—Promissory Note, dated March 28, 1938, in the amount of \$220.11....	21
15—Crop and Chattel Mortgage, dated April 9, 1937.....	23
16—Subordination Agreement, dated September 2, 1937.....	35
Designation of Record, Supplemental.....	242
Designation of Portions of Record to Constitute Record on Appeal.....	235
Findings of Fact and Conclusions of Law.....	219
Judgment of Dismissal (Final).....	229
Minutes of the Court of 4/28/42, showing trial as to Third Cause of Action.....	45

Index**Page**

Minutes of the Court of 4/29/42, showing Plaintiff's Motion for Voluntary Non-Suit, and Defendant's Motion for Dismissal with Prejudice	214
Motion of Defendant for Dismissal.....	217
Motion of Plaintiff for Continuance or for Dismissal without Prejudice.....	218
Motion to Dismiss Amended Complaint.....	39
Names and Addresses of Attorneys of Record..	1
Notice of Appeal.....	230
Order Denying Motion to Dismiss Amended Complaint	40
Order Extending Time for Docketing Record on Appeal	231
Order Extending Time for Filing Transcript (CCA)	232
Order of Dismissal (4/29/42).....	215
Statement of Facts.....	46
Statement of Points on Which Appellant Intends to Rely.....	233
Statement of Points Upon Which Appellant Intends to Rely, Supplemental.....	240
Transcript of Testimony.....	46

Index	Page
Exhibits for Defendant:	
1—Waller's Accounting for Geo. Brisky	210
2—Letter, 6/1/38, County Office to Pacific Fruit & Produce Co.....	212
Exhibits for Plaintiff:	
A—Ledger Sheet of Pacific Fruit and Produce Co.—Geo. Brisky, 1937..	197
B—Copy of Geo. Brisky's Ledger Sheet given to him.....	200
C—Produce Ticket—Pacific Fruit & Produce Co., 10/27/37.....	204
D—Copy of Geo. Brisky Account with Pacific Fruit & Produce Co., May 28, 1938	205
E—Summary Transcript of Account of Geo. M. Brisky—United States Department of Agriculture, Farm Security Administration	207
Witnesses for Plaintiff:	
Barrett, O. R. —direct	137, 145
Brisky, George —direct	77
—cross	86
—redirect	88

Index**Page****Exhibits for Plaintiff (Continued):****Nessen, Howard A.**

—direct	107
—cross	115
—redirect	123

Phipps, B. R.

—direct	123
—voir dire.....	130
—recalled, direct.....	171

Raines, C. D.

—direct	58
—cross	70
—redirect	75
—recalled, direct.....	183

Shons, Merle F.

—direct	183
---------------	-----

Waller, Henry

—direct	89
—cross	96
—redirect	102
—recross	104

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

EDWARD M. CONNELLY,

United States Attorney,

332 Post Office Bldg.,
Spokane, Washington.

HARVEY ERICKSON,

Assistant United States Attorney,

332 Post Office Bldg.,
Spokane, Washington.

Attorneys for Appellant

RYAN, ASKREN & MATHEWSON,
HOWARD W. SANDERS,

545 Henry Building,
Seattle, Washington.

Attorneys for Appellee

In the District Court of the United States for the
Eastern District of Washington, Northern Di-
vision.

No. 164

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PACIFIC FRUIT & PRODUCE COMPANY, a
corporation,

Defendant.

COMPLAINT

(As Amended)

The plaintiff, the United States of America, by
Lyle Keith, United States Attorney, and Harvey
Erickson, Assistant United States Attorney, for
the District above named, acting under the author-
ity and by the direction of the Attorney General,
complaining of the defendant, alleges:

* * * * *

Third: For a third cause of action

I.

At all times herein mentioned, the Resettlement
Administration, now the Farm Security Admin-
istration, was, and now is, a division, branch and
official federal agency of the United States of
America, duly created and authorized and empow-
ered to act as such by Executive Order No. 7027,
dated April 30, 1935, and Executive Order No.

7530, dated December 31, 1936, and by reason of said facts the United States of America is the real party in interest herein as plaintiff and the above entitled court has jurisdiction of this action.

II.

That at all times herein mentioned the defendant Pacific Fruit & Produce Company was a corporation duly licensed and qualified to do business in the State of Washington, the principal place of business being located in the City of Seattle, State of Washington.

III.

Between the dates of April 6, 1937 and June 15, 1937 the plaintiff advanced to George M. Brisky and Evelyn Brisky, husband and wife, of [1*] Route 1, Cashmere, Chelan County, Washington, hereinafter referred to as the borrowers, the sum of \$550.00; that in addition thereto the said George M. Brisky and Evelyn Brisky are indebted to the plaintiff in the sum of \$220.11, on account of a balance due on the loan made to them during the year 1936.

IV.

Between the said dates of April 6, 1937 and June 15, 1937, in consideration of the advance of said sum of \$550.00 and to evidence their indebtedness therefor, the said George M. Brisky and Evelyn Brisky made, executed and delivered to the United States their certain promissory notes in writing

*Page numbering appearing at foot of page of original certified Transcript of Record.

in amounts of \$165.00, \$155.00 and \$230.00, dated April 6, 1937, April 22, 1937, and June 15, 1937, respectively; that on March 28, 1938, in consideration of the balance then due on the 1936 loan, and to evidence their indebtedness therefor, the said George M. Brisky and Evelyn Brisky made, executed and delivered to the United States their certain renewal promissory note in writing in the said sum of \$220.11, dated March 28, 1938; that a copy of each of said promissory notes are attached hereto marked Exhibits 11, 12, 13 and 14, respectively, and by this reference made a part of this complaint.

V.

On or about April 9, 1937, in order to secure the repayment of the sum of \$795.00, which includes the balance then due on the 1936 loan in the sum of \$630.00, and the sum of \$165.00 which had then been advanced to them and their indebtedness for which is evidenced by their promissory note marked Exhibit 11, and to secure future advances in the sum of \$385.00, which were thereafter made and which are evidenced by their promissory notes marked Exhibits 12 and 13, the said George M. Brisky and Evelyn Brisky executed and delivered to the plaintiff their certain instrument known as a crop and chattel mortgage, a copy of which is attached hereto marked Exhibit 15 and by this reference made a part of this complaint, which crop and chattel mortgage was verified and acknowledged on April 9, 1937, and was thereafter on the

same day filed in the office of the County Auditor of Chelan County, Washington, as Instrument No. 40456.

VI.

By said crop and chattel mortgage, marked Exhibit 15, the plaintiff [2] acquired a first lien on all fruit crops produced or to be produced by the said George M. Brisky and Evelyn Brisky during the year 1937 upon the following described real property, to-wit:

Beginning at a point on the Section line between Sections 11 and 12, Township 23 N. Range 18, E. W. M., 800 ft. S. of the Govt. $\frac{1}{4}$ corner between aforesaid Sec. 11 and 12, running thence (corrected course) N. 57 51' E. to N. line of the NW $\frac{1}{4}$ of SW $\frac{1}{4}$ of said Sec. 12; thence E. to the NE corner of the NW $\frac{1}{4}$ of the SW $\frac{1}{4}$; thence S. to the SE corner of the NW $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Sec. 12; thence W to the SW corner of the NW $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Sec. 12, thence running N. to the point of beginning. Excepting the following tract of land; beginning at the SE corner of the NW $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Sec. 12, thence running E. along the S line of said NW $\frac{1}{4}$ of SW $\frac{1}{4}$ a distance of 580 ft. to a stake; thence N. a distance of 196 ft. to a stake; thence E. 580 ft. to said E. line of said NW $\frac{1}{4}$; thence S. along the E. line of said NW $\frac{1}{4}$ of SW $\frac{1}{4}$ to the place of beginning, containing $\frac{2}{6}$ acres, more or less.

Part of the SW $\frac{1}{4}$ of Sec. 12, Twp. 23 N. R. 18 E. W. M. described as follows, to-wit:

rendered by the defendant in connection therewith.

XI.

Pursuant to such request and to enable the said borrowers to obtain such additional financing, plaintiff agreed to and did execute a limited subordination agreement in favor of the said Pacific Fruit & Produce Company, a corporation, a copy of which subordination agreement is attached hereto, marked Exhibit 16 and by this reference made a part of this complaint and said defendant was informed of the execution of said subordination agreement by the terms of which agreement the plaintiff subordinated, to the limited extent set forth in said agreement, the lien of the crop and chattel mortgage in favor of the plaintiff, marked Exhibit 15 upon the fruit crop to be produced during 1937 by the said borrowers upon the above described real property to any and all liens thereafter created in favor of the defendant to secure the repayment of funds advanced to the said borrowers or charges incurred for services rendered in connection with producing and thereafter handling and selling said 1937 fruit crop.

XII.

On information and belief, thereafter the defendant herein having [4] accepted the benefits and terms of said limited subordination agreement proceeded in reliance thereon, with knowledge thereof and with knowledge that the plaintiff still continued to assert its prior lien to the extent that it

had not been subordinated by the subordination agreement to advance such funds and render such services as were needed by the said borrowers to aid them in financing such additional costs as were involved in producing and thereafter handling and selling the fruit crops produced during 1937 by the said borrowers on the above described real property; and such fruit crops after harvesting were thereafter delivered by said borrowers to the defendant herein pursuant to the terms of the arrangements effected between said borrowers and said defendant which at the request of said borrowers and pursuant to the arrangements hereinabove referred to proceeded to render all services and perform all acts necessary or related to handling and selling such fruit crops; and all such fruit crops were thereafter sold by the defendant and all proceeds realized from the sale thereof received and retained by the defendant.

XIII.

The plaintiff has no knowledge of the sums advanced to the said borrowers or the value of the services rendered by the defendant pursuant to the arrangements hereinabove referred to between the said borrowers and the defendant herein or of the charges incurred therefor or of the quantity and quality of the fruit crops produced by the said borrowers on the above described real property during the year 1937 and delivered by the said borrowers to the defendant or of the amount of the proceeds of each sale of fruit crops delivered to the

defendant by the said borrowers or of the amount which the defendant, under the terms of the subordination agreement hereinabove referred to and marked Exhibit 16 was authorized to deduct and withhold from the proceeds of each sale for the purpose of reimbursing said defendant for the sums advanced to or services rendered for the said borrowers.

XIV.

The plaintiff has repeatedly demanded of the defendant herein that said defendant render to the plaintiff a complete and detailed account of the quantity and quality of the crops produced by the said borrowers on the above described property during the year 1937 and thereafter delivered to said defendant by the said borrowers, of the sums advanced by the said defendant or the value of services rendered pursuant to the aforementioned arrange- [5] ments between said defendant and said borrowers and the charges therefor, of the amount of the proceeds of each sale of fruit crops delivered to the defendant by said borrowers, and of the amount which the defendant, under the terms of the subordination agreement hereinabove referred to and marked Exhibit 16 was authorized to deduct and withhold from the proceeds of each sale for the purpose of reimbursing said defendant for sums advanced to or services rendered for said borrowers and has repeatedly demanded of the defendant that the defendant pay over to the plaintiff the proceeds received by the defendant from each sale of

fruit crops delivered to said defendant by the said borrowers over and above the amount which the defendant, under the terms of the subordination agreement hereinabove referred to and marked as Exhibit 16 to this complaint, was entitled to deduct and withhold from the proceeds of each sale or such portion thereof as was necessary to satisfy the indebtedness of the said borrowers to the plaintiff, the payment of which was secured by the mortgage upon the fruit crops hereinabove referred to and marked Exhibit 15 to the complaint; but the defendant has failed, neglected and refused to render the accounting requested or to pay over to the plaintiff the proceeds received by the defendant from each sale of fruit crops delivered to said defendant by the said borrowers over and above the amount which the defendant, under the terms of the subordination agreement hereinabove referred to and marked Exhibit 16 to this complaint, was entitled to deduct and withhold from the proceeds of each sale or such portion thereof as was necessary to satisfy the indebtedness of the said borrowers to the plaintiff, the payment of which was secured by the mortgage upon the fruit crops hereinabove referred to and marked Exhibit 15 to this complaint; and by reason of defendant's failure, neglect and refusal to render such accountings and to pay over such proceeds plaintiff's security has been materially reduced and material damage to plaintiff has been occasioned thereby.

* * * * *

Wherefore, plaintiff prays judgment that defendant be directed to render plaintiff a just and full accounting of the transactions between the defendant and each of the persons above named and of the transactions engaged in by said defendant for and on behalf of each of said persons and relating to the production, handling or sale of the 1937 fruit crops produced by such persons on the real property above described; that upon such [6] accounting the defendant be required properly to state and prove the sums advanced to each of the persons hereinabove named and the services rendered and the charges incurred therefor pursuant to the arrangements effected between the defendant and each of said persons, the quality and quantity of the fruit crops produced by each of said persons and delivered to the defendant by said persons pursuant to the arrangements hereinbefore referred to between them and the defendant, the amount of the proceeds of each sale of the fruit crops delivered to the defendant by each of said persons and the amount which the defendant, under the terms of the subordination agreements hereinabove referred to, was authorized to deduct and withhold from the proceeds of each sale of fruit crops delivered to the defendant by each of said persons, for the purpose of reimbursing said defendant for funds advanced to or services rendered for each of said persons pursuant to the arrangements hereinabove referred to between the said defendant and each of said persons; that the plain-

tiff have judgment against the defendant for any sums or balances found to be due to the plaintiff upon such accountings, and that the plaintiff have such other and further relief as may be just, together with costs of this action.

LYLE KEITH,

United States Attorney.

HARVEY ERICKSON,

Assistant United States At-
torney.

Office and Postoffice

Address:

326 Federal Building

Spokane, Washington.

[Endorsed]: Filed Jan 22, 1941. [7]

EXHIBIT No. 11

Form Ra-Le 31.45B

Number of check—

11-22-35

R. R. case number—

Approved by the Administrator

Resettlement Administration

CHATTEL MORTGAGE NOTE B

For Use in Washington

56-40202,874

County of Chelan

\$165.00

4-6-37

Rt. 1, Cashmere, Washington

City

Date

For Value Received, I, we, or either of us, promise to pay to the order of the Administrator of the Resettlement Administration at his office in Olympia, Washington, the sum of One Hundred Sixty-five and no/100 Dollars (\$165.00), together with interest thereon, at five percent (5%) per annum from date until paid, payable as follows (strike out inapplicable clause):

1. On or before the fifteenth day of December, 1937.

2. ~~In installments, as follows:—~~

As used herein the Resettlement Administration or the Administrator thereof shall be construed to mean the United States.

Upon the failure to pay any of the said installments, or interest thereon, when the same comes due,

the holder may, at his option, declare the entire indebtedness to be due and payable.

The makers, endorsers, sureties, and guarantors of this note hereby severally waive presentment for payment, notice of nonpayment, protest and notice of protest, and diligence in enforcing payment or bringing suit against any party hereto; and the endorsers, sureties, and guarantors hereby severally consent that the time of payment may be extended or this note renewed from time to time without notice to them and without affecting the liability thereon.

In the event any installment of principal of this note or interest thereon be not paid when due and this note is placed in the hands of an attorney for collection, or suit is brought on the same, or any portion thereof, the makers, endorsers, sureties, and guarantors hereby jointly and severally agree to pay such reasonable attorney's fees and costs of collection as may be permitted by law to be charged.

[8]

This note is given as evidence of a loan made to the makers hereof by the Administrator of the Resettlement Administration, which loan is secured by a chattel mortgage, dated, 19...., cov-

ering livestock, crops, and/or other personal property.

/s/ GEO. M. BRISKY,

(Husband)

/s/ EVELYN BRISKY,

(Wife)

Rt. 1, Cashmere

(Post office address)

Chelan, Washington

(County)

U. S. Government Printing Office 16-4735 [9]

EXHIBIT No. 12

Form RA-LE 31.45

Number of check.....

11-22-35

R R case number.....

Approved by the Administrator

Resettlement Administration

CHattel Mortgage Note B

56-04-202,874-2

For Use in Washington

County of Chelan

\$155.00 Cashmere, Washington. April 22, 1937

(City)

(Date)

For Value Received, I, we, or either of us, promise to pay to the order of the Administrator of the Resettlement Administration at his office in Olympia, Washington, the sum of One Hundred

Fifty-Five and no/100 Dollars (\$155.00) together with interest thereon, at five per cent (5%) per annum from date until paid, payable as follows (strike out inapplicable clause):

1. On or before the fifteenth day of December, 1937

2. ~~In~~ installments, as follows:

As used herein the Resettlement Administration or the Administrator thereof shall be construed to mean the United States.

Upon the failure to pay any of the said installments, or interest thereon, when the same comes due, the holder may, at his option, declare the entire indebtedness to be due and payable.

The makers, endorsers, sureties, and guarantors of this note hereby severally waive presentment for payment, notice of nonpayment, protest and notice of protest, and diligence in enforcing payment or bringing suit against any party hereto; and the endorsers, sureties, and guarantors hereby severally consent that the time of payment may be extended or this note renewed from time to time without notice to them and without affecting the liability thereon.

In the event any installment of principal of this note or interest thereon be not paid when due and this note is placed in the hands of an attorney for collection, or suit is brought on the same, or any portion thereof, the makers, endorsers, sureties, and guarantors hereby jointly and severally agree to pay such reasonable attorney's fees, and costs of

collection as may be permitted by law to be charged. [10]

This note is given as evidence of a loan made to the makers hereof by the Administrator of the Resettlement Administration, which loan is secured by a chattel mortgage, dated.....19....., covering livestock, crops, and/or other personal property.

Rt. 1, Cashmere

(Post office address)

Chelan, Washington.

(County)

/s/ GEORGE M. BRISKY

(Husband)

/s/ EVELYN BRISKY

(Wife)

U. S. Government Printing Office 16-4735 [11]

EXHIBIT No. 13

Form RA-LE 31.45 B

Number of check.....

11-22-35

R R case number.....

Approved by the Administrator

Resettlement Administration

CHATTEL MORTGAGE NOTE B

56-04-202,874-2

For Use in Washington

County of Chelan

\$230.00 Cashmere, Washington
(City)

June 15, 1937
(Date)

For Value Received, I, we, or either of us, promise to pay to the order of the Administrator of the Resettlement Administration at his office in Olympia, Washington, the sum of Two Hundred Thirty Dollars and no/100 Dollars (\$230.00) together with interest thereon, at five per cent (5%) per annum from date until paid, payable as follows (strike out inapplicable clause):

1. On or before the fifteenth day of December, 1937

2. ~~In installments, as follows:~~

As used herein the Resettlement Administration or the Administrator thereof shall be construed to mean the United States.

Upon the failure to pay any of the said installments, or interest thereon, when the same comes due, the holder may, at his option, declare the entire indebtedness to be due and payable.

The makers, endorsers, sureties, and guarantors of this note hereby severally waive presentment for payment, notice of nonpayment, protest and notice of protest, and diligence in enforcing payment or bringing suit against any party hereto; and the endorsers, sureties, and guarantors hereby severally consent that the time of payment may be extended or this note renewed from time to time without notice to them and without affecting the liability thereon.

In the event any installment of principal of this note or interest thereon be not paid when due and this note is placed in the hands of an attorney for collection, or suit is brought on the same, or any portion thereof, the makers, endorsers, sureties, and guarantors hereby jointly and severally agree to pay such reasonable attorney's fees and costs of collection as may be permitted by law to be charged. [12]

This note is given as evidence of a loan made to the makers hereof by the Administrator of the Resettlement Administration, which loan is secured by a chattel mortgage, dated.....19...., covering livestock, crops, and/or other personal property.

Rt. 1, Cashmere

(Post office address)

Chelan, Washington.

(County)

/s/ GEO. M. BRISKY

(Husband)

/s/ EVELYN BRISKY

(Wife)

EXHIBIT No. 14

Form RA-LE 124

7-28-36

Resettlement Administration

RENEWAL CHATTEL MORTGAGE NOTE B

56-4-202,874-;

~~Idaho~~

Washington

County of Chelan

\$220.11 Cashmere, *Idaho*

March 28, 1938

(City)

(Date)

For Value Received, I, we, or either of us, promise to pay to the order of the Administrator of the Resettlement Administration at his office in Olympia, Wash. the sum of Two Hundred Twenty and 11/100 Dollars (\$220.11), together with interest thereon, at five percent (5%) per annum from the 9th day of February, 1938 until paid, payable as follows (strike out inapplicable clause):

1. On or before the 15th day of February, 1939.
2. In . . . installments, as follows:

Upon the failure to pay any of the said installments, or interest thereon, when the same comes due, the holder may, at his option, declare the entire indebtedness to be due and payable.

The makers, endorsers, sureties, and guarantors of this note hereby severally waive presentment for payment, notice of nonpayment, protest and notice

of protest, and diligence in enforcing payment or bringing suit against any party hereto; and the endorsers, sureties and guarantors hereby severally consent that the time of payment may be extended or this note renewed from time to time without notice to them and without affecting the liability thereon.

In the event any installment of principal of this note or interest thereon be not paid when due and this note is placed in the hands of an attorney for collection, or suit is brought on the same, or any portion thereof, the makers, endorsers, sureties, and guarantors hereby jointly and severally agree to pay such reasonable attorney's fees and costs of collection as may be permitted by law to be charged.

This note is given as evidence of a loan made to the makers hereof by the Administrator of the Resettlement Administration, and is a renewal of a note in the sum of \$250.00 note dated 5-14-36 190.00 note dated 6-13-36 190.00 note dated 7-29-36 (\$.....) Dollars, executed by the [14] makers hereof to the Administrator of the Resettlement Administration on day of, 19..., which loan was and is secured by a chattel mortgage or mortgages covering livestock, crops and/or other personal property and/or a real estate mortgage. The said mortgage and/or mortgages and any other security which the Administrator of the Resettlement Administration may have to secure said loan are not affected by the execution of this renewal note, and all of said security continues to secure the

original loan and any original indebtedness that may be included in this note.

/s/ GEORGE M. BRISKY

(Husband)

/s/ EVELYN BRISKY

(Wife)

Rt. 1, Cashmere

(Post Office Address)

Chelan, Washington

(County) (State)

As used herein the Resettlement Administration or the Administrator thereof shall be construed to mean the United States. [15]

EXHIBIT No. 15

Form RA-LE 30.45c

1-8-36

Approved by the Administrator

Resettlement Administration

CHattel Mortgage

For Use in the State of Washington

56-4-202,874

I. This Mortgage, made this 9th day of April, 1937, by George M. Brisky and Evelyn Brisky, of Rt. #1, Cashmere, (Post-Office Address) County of Chelan, State of Washington, hereinafter called the Mortgagor), to the Administrator (hereinafter called the Mortgagee) of the Resettlement Administration, a Federal agency established by Executive Order No. 7027, dated April 30, 1935.

Exhibit No. 15—(Continued)

II. Witnesseth: That in consideration of, and for the purpose of securing the payment of:

1. The sum of Seven Hundred Ninety-Five Dollars and no/100 Dollars (\$795.00), (together with interest thereon at the rate of five percent per annum), loaned to the Mortgagor, the receipt of which is hereby acknowledged and which debt is evidenced by a promissory note executed by the Mortgagor to the Mortgagee and described as follows:

Amount of Note	Date of Note	Maturity Date	Rate of Interest
\$165.00	April 6, 1937	December 15, 1937	5%
\$630.00	July 29, 1936	May 1, 1937	5%

2. Any additional sum or sums, not exceeding the aggregate sum of Three Hundred Eighty-Five and no/100 Dollars (\$385.00), together with interest thereon at a rate not in excess of five percent per annum, in addition to the indebtedness above described, hereafter loaned or advanced by the Mortgagee to the Mortgagor for any purposes up to the fifteenth day of December, 1937.

3. Any additional sum or sums, in addition to the indebtedness above described, together with interest thereon at the rate of five percent per annum, hereafter expended by the Mortgagee for the purpose of maintaining the value of protecting or preserving the existing collateral, including the payment of taxes on the property which is the subject matter of this mortgage (whether delinquent or otherwise), water assessments and similar charges during the existence of this mortgage, and whether

Exhibit No. 15—(Continued)

or not said advances are made at the request of the Mortgagor and whether they are [16] evidenced by promissory notes or otherwise.

4. Any and all extensions or renewals, and successive extensions or renewals of the note or notes above described, or of the indebtedness represented by the same, and of any other indebtedness at any time secured by this mortgage, whether represented by promissory notes or otherwise, and all the interest on the same, all of which extensions or renewals shall be optional with the Mortgagee, and for all of which this mortgage shall stand as a continuing security until paid.

(All loans and advances made hereunder, to, or for the benefit of, the Mortgagor shall become a part of the principal debt and shall be payable, unless otherwise agreed on or before the 15th day of December, 1937, at the office of the Mortgagee at Olympia, Washington.)

III. The Mortgagor does hereby grant, bargain, sell, and convey unto said Mortgagee, his successors or assigns, the following-described personal property now owned by and in possession of the Mortgagor, and now located in the county of Chelan, State of Washington.

To wit:

1. Livestock: All livestock specifically described as follows: (Give brand, or other markings, age, weight, breed, etc.):

2 White Horses, 1-17 Yrs. 1-12 Yrs., 1600 lbs.
each (Approx.)

Exhibit No. 15—(Continued)

1 Jersey Heifer, L Yr., Dark Red, shading to Black in Color.

1 Jersey Cow, Cream Color, 7 yrs., Horns, "Boss" No Ear Tag.

All chickens owned by me approximately 40 Leghorns and Buff Orphingtons.

23 Hogs—5 Sows white, 2 Yrs.—1 Black Boar—2 years and

17 Shoats—white and black 6 months.

1 Sterling Pump, #6842

1 3 Hp. U. S. Motor, #106740

1 1 Hp. Sears Roebuck Motor

1 1¼" Pump

1 200 Gal. Wood Tank

1 12 Gal. Haride Pump

1 4 Hp. Cushman Engine

150 Ft. (Approx.) of 1¼" Black Pipe

1500 Ft. (Approx.) of ¾" Galv. Spray Pipe

Misc. Orchard Tools and Equipment

1 20 Tooth Spike Tooth Harrow

1 2 Shovel Oliver Ditcher, Steel Tongue,
Horse Drawn

1 2 Horse Disc, 8 Blade, Steel Hookings,
No Seat

1 4 Wheel (Steel) Wagon, Wood Tongue

1 Spring Tooth Harrow

1 McCormick mower, Wood Tongue (Spliced)

1 McCormick Rake, 2x8 Wood Tongue

All of the above-described goods and chattels being found and kept on the farm of George M.

Exhibit No. 15—(Continued)

Brisky, which farm is located 5 miles West of (Direction)* [17] Cashmere, Wn., (nearest town)* and which hereinafter is more particularly described.

3. Crops: All crops, to the fullest extent of the Mortgagor's interest therein, now planted or growing, or to be planted or grown, subject to the following conditions:

All annual field crops, or seed therefor, having been sown or planted within one year from the date hereof; and/or (b) all crops grown upon perennial plants (other than fruit or nut crops) provided this mortgage is executed not more than one year prior to the time the seed, bulbs, roots, or tubers thereof are sown or planted, covering any and/or all crops to be harvested during the first and/or second year after such sowing or planting; and/or (c) any or all crops grown or perennial plants (other than fruits or nuts) the seed, bulbs, roots, or tubers of which have been sown or planted more than two years, provided this mortgage is executed after and not before the 30th day of November of the year preceding that in which such crops grow and mature; and/or (d) all crops grown upon biennial plants, provided this mortgage is executed not more than one year prior to the time the seed thereof is sown or planted, covering any or all crops grown from seed; and/or (e) all fruit or nut crops growing upon perennial trees or plants, provided

*Printer's Note—Written in with pen and ink.

Exhibit No. 15—(Continued)

this mortgage is executed after, but not before, the 30th day of November of the year preceding that in which the crop grows or matures by the Mortgagor, his agent or agents, upon the following-described land in the County of Chelan, State of Washington:

Beginning at a point on the Sec. line between Sec's 11 and 12, Twp. 23, N. R. 18, E. W. M. 800 ft. S. of the Govt. $\frac{1}{4}$ corner between aforesaid Sec. 11 and 121 running thence (corrected course) N. 57 51' E, to N. line of the NW $\frac{1}{4}$ of SW $\frac{1}{4}$ of said Sec. 12; thence E. to the NE corner of the NW $\frac{1}{4}$ of the SW $\frac{1}{4}$; thence S. to the SE corner of the NW $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Sec. 12; thence W to the SW corner of the NW $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Sec. 12, thence running N. to the point of beginning. Excepting the following tract of land; beginning at the SE corner of the NW $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Sec. 12, thence running E along the S line of said NW $\frac{1}{4}$ of SW $\frac{1}{4}$ a distance of 580 ft. to a stake; thence N. a distance of 196 ft. to a stake; thence E 580 ft. to said E. line of said NW $\frac{1}{4}$; thence S along the E line of said NW $\frac{1}{4}$ of SW $\frac{1}{4}$ to the place of beginning, containing $\frac{2}{6}$ acres, more or less.

Part of the SW $\frac{1}{4}$ of Sec. 12, Twp. 23 N. R. 18 E. W. M. described as follows, to-wit: Beginning at the NW corner of the SW $\frac{1}{4}$ of SW $\frac{1}{4}$ Sec. 12, Twp 23, N., R. 18 E. W. M., and running S. 317 ft. to a stake; thence E. 740 ft.

Exhibit No. 15—(Continued)

to a stake; thence N. 317 ft. to a stake. All of the above in Chelan County, Washington.

4. It is agreed that to the extent permitted by law, this mortgage includes all the property of the kinds above described now owned by the Mortgagor, whether or not same be described specifically herein, all property of like kinds and all other farm property acquired by the Mortgagor during the life of this mortgage, and any and [18] all increase in and all replacements of or additions to the livestock herein mortgaged, and all wool and mohair now on or that may hereafter grow upon or be sheared from the sheep or goats mortgaged hereunder, and all the right, title, and interest of the Mortgagor in and to all feed, seed, fertilizer, supplies, and equipment, and all grazing rights, pasture, and water privileges had, acquired, or held by the Mortgagor in his livestock, fruit, or other agricultural operations during the life of this mortgage.

To Have and to Hold, the said personal property unto the Mortgagee, his successors and assigns, forever.

IV. The mortgagor covenants and agrees that:

1. He is entitled to the possession of the above-described property and that the same is now in his possession at the location above described and that he is the absolute and exclusive owner of said chattels and that the same are free from all liens and incumbrances except as indicated, to wit;

2. The marks and brands above used to de-

Exhibit No. 15—(Continued)

scribe any livestock are the holding brands and carry the title, although the livestock may have other marks and brands;

3. He will warrant and defend all property hereby mortgaged against any or all persons whomsoever;

4. He will properly care for all the property herein mortgaged;

5. He will promptly pay all taxes, liens, and other charges assessed or levied upon or attaching to the property herein mortgaged and upon the above-described premises during the continuance of this mortgage; and will, if requested in writing to do so by the Mortgagee, keep the property fully insured, for the benefit of the Mortgagee, against loss by theft, or by fire or other natural causes;

6. He will expend all funds advanced hereunder by the Mortgagee only for the purposes for which such funds are advanced and only as the Mortgagee shall direct, and a diversion of any such funds to any other purpose will constitute a default under the terms of this mortgage entitling the Mortgagee to exercise the remedies hereinafter specified; [19]

7. He will not sell, remove or encumber the property herein mortgaged or permit others to do so without the written consent of the Mortgagee.

V. Provided, Nevertheless, that these presents are upon the express conditions that if the Mortgagor shall pay unto the Mortgagee, all sums the payment of which is secured by this mortgage, and if he shall fully perform all the terms, covenants,

Exhibit No. 15—(Continued)

and conditions of this mortgage, then this conveyance shall be void, otherwise to remain in full force and effect;

But if default be made in the payment of said principal sum of money, or any installment of principal or interest thereon, as provided in said note or notes, or if the Mortgagor fails to repay any and all advances made by the Mortgagee to or for the Mortgagor, or if the Mortgagor fails to keep or comply with any of the covenants and agreements on his part to be kept and performed as herein stated, or in case any representation herein made by the Mortgagor prove false in any respect, or in case of the actual bankruptcy or of the insolvency of the Mortgagor, or if any of the property subjected to the lien hereof is attached, levied upon, or for any reason taken possession of or detained by any person other than the Mortgagee, or if for any reason the Mortgagee should deem himself insecure, the Mortgagee may, at his option, exercise any or all remedies hereinafter specified, the exercise of which, or any of which, shall be considered as optional with the Mortgagee and cumulative and not as a waiver of any other right or remedy which would otherwise exist in law or equity for the enforcement of this mortgage or the collection of the indebtedness secured thereby.

1. The Mortgagee may, to the extent permitted by law, enter upon the premises where the property herein mortgaged is kept, or is growing, and may do all things necessary to care for said livestock,

Exhibit No. 15—(Continued)

or cultivate and/or harvest said crops, and may take immediate possession of said crops when matured or harvested, and dispose of the same at the best price obtainable therefor. All expenses incurred by the Mortgagee in so doing, together with interest thereon at the rate specified in the note above described, shall be a charge against the Mortgagor and shall be considered secured by these presents and be a lien on said property in the same [20] manner as the principal debt.

2. The Mortgagee may declare, at his option, the whole of the indebtedness hereby secured at once due and payable, and foreclose this mortgage in any manner or form provided by law, and forthwith, if permitted by law to do so, take possession of and sell or remove and sell said property, or so much thereof as may be necessary, to satisfy all indebtedness secured by this mortgage and the interest thereon, together with a reasonable sum as counsel fees, and all expenses, that may be incurred in the keeping, care, transportation, and sale of said property, either at private sale, with or without notice, or at public auction, after giving such notice as is required by law of the time and place of sale and shall apply the proceeds of such sale to the discharge of said debts, interest, and expenses, and shall pay any surplus to the Mortgagor or his assigns.

VI. The Mortgagor, if permitted by law to do so, hereby waives and relinquishes all rights of

Exhibit No. 15—(Continued)

appraisement, sale, or redemption under the laws of the State of Washington.

VII. It Is Agreed That:

1. At any sale made hereunder, the parties hereto, if permitted by law to do so, may purchase as if they were not parties.

2. The words "Mortgagor" and "Mortgagee" shall be construed as including heirs, successors, administrators, executors, assigns, agents, and principals of each.

3. The invalidity of any one or more of the provisions of this mortgage shall not effect the validity of the remainder of the provisions.

In Witness Whereof, the said Mortgagor(s) has (have) hereunto set his (their) hand(s) and seal(s), the day and year in this instrument first above written.

[Seal] /s/ GEORGE M. BRISKY

[Seal] /s/ EVELYN BRISKY

Witnesses:

.....
/s/ MARION H. WEBSTER

As used herein the Resettlement Administration or the Administrator thereof shall be construed to mean the United States. [21]

State of Washington,
County of Chelan—ss:

Be It Remembered, that on this 9th day of April, 1937 before me, the undersigned, a notary public in and for said county and State, personally ap-

Exhibit No. 15—(Continued)

peared the within-named George M. Brisky and Evelyn Brisky, known to me to be the identical persons described in and who executed the within instrument, and acknowledged that they signed, sealed, and delivered the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto set my hand and seal, the day and year last above written.

/s/ MARION H. WEBSTER

Notary Public in and for the
State of Washington. Re-
siding at Wenatchee.

My commission expires 6/3/39.

State of Washington,
County of Chelan—ss:

The undersigned makes solemn oath and says: That he is the Mortgagor named in the foregoing mortgage; that said mortgage is made in good faith; that the said claim is just and unpaid; and that the foregoing mortgage is given to secure the same without any design to hinder, delay, or defraud creditors.

/s/ GEORGE M. BRISKY

Mortgagor.

/s/ EVELYN BRISKY

Subscribed and sworn to before me this 9th day of April, 1937.

/s/ MARION H. WEBSTER

Notary Public in and for the
State of Washington. Re-
siding at Wenatchee.

My commission expires 6/3/39. [22]

EXHIBIT No. 16

Form RA-11 LE (here follows a number not legible)

Revised 7-7-3 (here follows a number not legible)
Portland, Oregon

United States Department of Agriculture
Resettlement Administration

SUBORDINATION AGREEMENT

Whereas, the United States of America, acting by and through the Secretary of Agriculture pursuant to Executive Order No. 7530 dated December 31, 1936, as amended, is at present the owner of a certain chattel mortgage, executed by Geo. M. Brisky and Evelyn Brisky, of Rt. 1, Cashmere, Washington, hereinafter called the Mortgagor, dated the 7th day of April, 1937, and filed on the 9th day of April, 1937, in the office of the County Auditor of Chelan County, State of Washington, as Instrument No. 40456, which mortgage covers all of the Mortgagor's crops now growing or to be grown on the following described real property, to-wit:

Beginning at a point on the Sec. line between

Sec's 11 and 12, Twp. 23, N. R. 18, E. W. M. 800 ft. S. of the Govt. $\frac{1}{4}$ corner between afore-said Sec. 11 and 121 running thence (corrected course) N. 57 51' E, to N. line of the NW $\frac{1}{4}$ of SW $\frac{1}{4}$ of said Sec. 12; thence E. to the NE corner of the NW $\frac{1}{4}$ of the SW $\frac{1}{4}$; thence S. to the SE corner of the NW $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Sec. 12; thence W to the SW corner of the NW $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Sec. 12, thence running N. to the point of beginning. Excepting the following tract of land; beginning at the SE corner of the NW $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Sec. 12, thence running E along the S line of said NW $\frac{1}{4}$ of SW $\frac{1}{4}$ a distance of 580 ft. to a stake; thence N. a distance of 196 ft. to a stake; thence E 580 ft. to said E. line of said NW $\frac{1}{4}$; thence S along the E line of said NW $\frac{1}{4}$ of SW $\frac{1}{4}$ to the place of beginning, containing $\frac{2}{6}$ acres, more or less.

Part of the SW $\frac{1}{4}$ of Sec. 12, Twp. 23 N. R. 18 E. W. M. described as follows, to-wit: Beginning at the NW corner of the SW $\frac{1}{4}$ of SW $\frac{1}{4}$ Sec. 12, Twp 23, N., R. 18 E. W. M., and running S. 317 ft. to a stake; thence E. 740 ft. to a stake; thence N. 317 ft. to a stake. All of the above in Chelan County, Washington.

And, Whereas, the said Mortgagor is in need of additional funds for the purpose of spraying, picking, sorting, washing, wrapping, packing, transporting, warehousing and/or marketing his fruit crop and has applied to Pac. Fruit & Product Co. Cash-

mere hereinafter called the Creditor for a loan for any or all of these purposes,

Now, Therefore, for and in consideration of a loan or advance made or to be made by the Creditor,

The United States of America, acting by and through the Secretary of Agriculture, does hereby subordinate the chattel Mortgage above described to any or all liens upon the Mortgagor's fruit crop for the year 1937 hereafter created by the said Mortgagor in favor of the Creditor to secure said loan, provided, however, that such subordination shall be limited to the extent of Sixty (\$.60) cents per box on all fruit sold by the Mortgagor, and does specifically agree that the Creditor shall have the right to deduct and receive from all sales made [23] by the said Mortgagor of his 1937 fruit crop the sum of Sixty (\$.60) cents per box from each sale made by him until the loan made by the Creditor shall have been paid in full.

This agreement is upon the condition, however, that the United States of America, acting by and through the Secretary of Agriculture, shall have a first lien on all proceeds from each and every sale of any part of the Mortgagor's 1937 fruit crop after the deduction of Sixty (\$.60) Cents per box from the proceeds of such sale has been made by the Creditor.

This agreement does not subordinate any lien held by the United States of America, acting by and through the Secretary of Agriculture, on any property of the Mortgagor other than the fruit

crops grown by him during the year 1937 on the real property herein described, and does not subordinate any lien held by the United States of America, acting by and through the Secretary of Agriculture on any of the property, real or personal, of the Mortgagor to any liens heretofore in existence and held by the aforesaid Creditor, this Agreement extending only to the present advance in consideration of which it is given.

In Witness Whereof, the Secretary of Agriculture has caused this Instrument to be executed by his duly authorized agent, this 2nd day of September, 1937.

HENRY A. WALLACE

Secretary of Agriculture

(For and on behalf of the
United States)

By C. L. SMITH, Agent

(Title) Act. Reg. Dir.

State of Oregon

County of Multnomah—ss.

On this 2nd day of Sept., 1937, before me, O. R. Woods, a Notary Public in and for the County and State aforesaid personally appeared the Secretary of Agriculture by his duly authorized agent, the within named C. L. Smith, to me *Inown* to be the individual described in and who executed the within and foregoing instrument for *an* on behalf of the said Secretary of Agriculture and acknowledged to me that he signed the same as his free and volun-

tary act and deed for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] /s/ O. R. WOODS

Notary Public in and for the State of Oregon.

Residing at Portland, Oregon.

My Commission expires Jan. 13, 1940. [24]

[Title of District Court and Cause.]

MOTION TO DISMISS AMENDED
COMPLAINT

Comes now the defendant by Ryan, Askren & Mathewson, its attorneys, and moves the Court dismissing the above entitled action and each and every cause of action therein contained as amended for the reason and upon the ground that the same does not state a claim against the defendant upon which relief can be granted.

Dated this 6th day of November, 1941.

RYAN ASKREN & MATHEW-
SON

Attorneys for the Defendant.

Copy received 11-7-41.

LYLE KEITH

U. S. Attorney

[Endorsed]: Filed Nov. 7, 1941. [25]

[Title of District Court and Cause.]

ORDER DENYING MOTION TO DISMISS
AMENDED COMPLAINT

This matter coming on for hearing before the above-entitled Court on the 23rd day of March, 1942, and the Court having heard the argument of counsel, and having considered authorities submitted by both the plaintiff and the defendant, and being fully advised in the premises, it is therefore

Ordered and Adjudged that the motion of defendant to dismiss the amended complaint shall be denied and that the defendant shall proceed to file an answer to the plaintiff's amended complaint within 10 days from date hereof.

Done in Open Court this 8th day of April, 1942.

L. B. SCHWELLENBACH

United States District Judge

Approved as to form:

RYAN, ASKREN & MATHEW-
SON

Attorneys for Defendant

Presented by:

HARVEY ERICKSON

Assistant U. S. Attorney

[Endorsed]: Filed April 18, 1942. [26]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant and for answer to the

complaint of the plaintiff denies, admits and alleges as follows:

I.

Answering Paragraphs I and II of each cause of action set forth in the plaintiff's complaint, the defendant admits the same.

II.

Answering Paragraphs III and IV of each cause of action set forth in the plaintiff's complaint, the defendant denies it has any knowledge or information sufficient to form a belief as to the truth or falsity of any of the allegations therein contained and therefore denies the same.

III.

Answering Paragraph V of each cause of action set forth in the plaintiff's complaint, the defendant admits the same.

IV.

Answering Paragraph VI of each cause of action set forth in the plaintiff's complaint, the defendant admits the same excepting only that the defendant denies that said lien on the crop therein described was an essential part of the plaintiff's security.

V.

Answering Paragraph VII of each cause of action set forth in the plaintiff's complaint, the defendant denies it has any knowledge or information sufficient to form a belief as to the truth or falsity of any of the allegations therein contained and therefore denies the same.

VI.

Answering Paragraphs VIII, IX and X of each cause of action set forth in the plaintiff's complaint, the defendant admits the same.

VII.

Answering Paragraph XI of each cause of action set forth in the plaintiff's complaint, the defendant admits that the plaintiff executed the subordination agreement, which is annexed to the plaintiff's complaint as an exhibit, but denies that after the execution of said agreement the [27] plaintiff had any right, title, estate, lien or interest in the crop described in said complaint.

VIII.

Answering Paragraph XII of each cause of action set forth in the plaintiff's complaint, the defendant admits that after the execution of said subordination agreement it advanced to the borrower funds but denies that the plaintiff thereafter had any right, title, estate, lien or interest in the said crop or any part thereof.

IX.

Answering Paragraph XIII of each cause of action set forth in the plaintiff's complaint, the defendant alleges that the plaintiff requested of the defendant permission to examine the books of the defendant to ascertain from the defendant the advances made by the defendant to the borrower and the fruit received by the defendant from the borrower. Notwithstanding the fact that the plaintiff

had no right, title, estate, lien or interest in the said crop, or any part thereof, the defendant did grant permission to the plaintiff to make such audit and such audit was made by the officials of the United States Government and a copy of such audit was delivered to the defendant by the plaintiff. Such audit represents the full and correct value of the fruit on the respective dates set forth in said audit.

X.

Answering Paragraph XIV of each cause of action set forth in the plaintiff's complaint, the defendant denies each and every allegation, matter or thing therein contained, alleged or set forth excepting only as herein elsewhere admitted.

For a First Further and Affirmative Defense to each of the causes of action set forth in the plaintiff's complaint the defendant alleges:

I.

That heretofore the plaintiff obtained a crop mortgage upon the crop described in each cause of action set forth in its complaint.

II.

Thereafter the plaintiff released the lien of its said mortgage [28] on the crop of the borrower, copies of which releases are attached to the plaintiff's complaint, and thereafter the plaintiff had no right, title, estate, lien or interest in the crop of any of the borrowers set forth in the plaintiff's complaint.

III.

Thereafter the defendant advanced to each of the borrowers set forth in the plaintiff's complaint sums on its crop and purchased the entire crop from each of the borrowers and accounted in full to the borrowers for all fruit delivered to it by each of the borrowers.

For a Second Further and Affirmative Defense the defendant alleges that at the time the plaintiff took its said mortgage on the crop of the borrowers described in the plaintiff's complaint it likewise took a mortgage on other personal property belonging to said borrower as set forth in the exhibits attached to the plaintiff's complaint.

That if it should be held that the plaintiff has any right, title, estate, lien or interest whatsoever in the crop described in the plaintiff's complaint the plaintiff should be required to make application of the security included in said mortgage other than the crop before requiring the defendant to render any accounting to the plaintiff for the proceeds of such crop, which crop is the only security which the defendant had for indebtedness due to it by the respective borrowers.

Wherefore, having fully answered the complaint of the plaintiff, the defendant prays that said action be dismissed and that it have and recover its costs and disbursements herein to be taxed.

RYAN, ASKREN & MATHEW-
SON

HOWARD W. SANDERS

Attorneys for Defendant.

Office and Post Office Address:

545 Henry Building

Seattle, Washington

[Endorsed]: Filed April 21, 1942. [29]

[Title of District Court.]

April 1942 Term

13th day

Tuesday, April 28, 1942

Court convened pursuant to adjournment, at
10:00 A. M.

Present: Hon. Lewis B. Schwellenbach, District
Judge, A. A. LaFramboise, Clerk, Harvey
Erickson, Assistant U. S. Attorney, R. R.
Isaacs, Deputy U. S. Marshal and Mrs. J. J.
Cole, Court Reporter.

PROCEEDINGS

* * * * *

No. 164

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PACIFIC FRUIT AND PRODUCE CO.,

Defendant.

RECORD OF TRIAL

Now on this 28th day of April, 1942, this case

was regularly called for trial, both parties being ready. On application of Mr. Erickson, Mr. Kenneth Kaseberg permitted to assist as counsel in the trial of the case.

After the opening statement by each counsel, the trial proceeded as to cause of action No. 3.

* * * * *

Thereupon Court adjourned until April 29, 1942 at 9 A. M. [30]

[Title of District Court and Cause.]

Date: April 28, 1942.

Before: The Honorable L. B. Schwellenbach,
Judge of the above styled court.

Appearances:

For the Plaintiff:

Mr. Harvey Erickson, Assistant
U. S. District Attorney.

For the Defendant:

Ryan, Askren & Matthewson, and
Mr. Howard W. Sanders.

STATEMENT OF FACTS [31]

On this 28th day of April, 1942, the above styled cause coming on for hearing and for trial before the Honorable L. B. Schwellenbach, Judge of the above styled Court, and all parties having announced ready for trial, the following proceedings were had, testimony taken and exhibits introduced:

Judge Schwellenbach: Is there any objection to consolidating the two cases for trial—the Pacific Fruit & Produce and the Miners & Merchant's Bank cases?

Mr. Sanders: I don't know how we are involved in that suit.

Mr. Erickson: You are a witness.

Mr. Sanders: Unfortunately you served subpoena on a man from the bank that knows nothing about it and has no records entitling him to this jurisdiction.

Mr. Erickson: It was his bank bought the fruit.

DISCUSSION

Mr. Sanders: May I make this suggestion. Supposing Counsel makes an opening statement of what his position is and what he intends to prove then let counsel for the defendants make their opening statement of their version of the case and see just exactly how far we are apart and exactly how much the evidence in one case will have a bearing on the other case.

Judge Schwellenbach: All right. We will proceed. Which causes of action in 164 are to be tried?

Mr. Sanders: The third cause of action, your Honor. [34]

Judge Schwellenbach: (Reading from files) You admit paragraphs 1 and 2, that is that the Resettlement Administration, now, the Farm Security Administration, is a branch of the United States Gov-

ernment, and the defendant is a Washington corporation. You deny '3' and '4'——

Mr. Sanders: I might say in regard to the denial of '3' and '4' I think Counsel, if he would produce the letter from the Department showing what the status of those loans is I would not require him to bring the actual officers here—I have no desire to be technical—the letter should be sufficient.

Judge Schwellenbach: Those two are the ones alleging the loan to the Briskys and the execution of the notes by the Briskys to the Resettlement Administration. You admit paragraph '5' which alleges the executing and the filing of the chattel mortgage. You admit '6' in so far as it is a description of the property, but deny its a first lien.

Mr. Sanders: No, I admit its a first lien, but Counsel said it was essential part of the security, and I deny it was essential part. I submit he had other security which was of more value than this.

Judge Schwellenbach: All right. Your same statement as to the letter will apply to paragraph VII?

Mr. Sanders: Yes.

Judge Schwellenbach: You state if he produces the letter that will be sufficient.

Mr. Sanders: Yes. [35]

Judge Schwellenbach: You admit paragraphs 8, 9, 10—those refer to the necessity for additional financing required by the defendant of the crop mortgage and the request for the subordination agreement. Answering paragraph 11 you admit the

execution of the subordination agreement, but deny the legal effect of it.

Mr. Sanders: Yes.

Judge Swollenbach: Answering paragraph 12 you admit you advanced funds after the subordination agreement was executed, but deny that the plaintiff has any legal right in the crop or lien against it.

Mr. Sanders: Yes.

Judge Swollenbach: You really deny 13——

Mr. Sanders: Yes, it is in effect a denial.

Judge Swollenbach: You say you gave them all the information they requested. Then you deny 14. And your first affirmative defense raises the issue of waiver of lien.

Mr. Sanders: Yes, your Honor, whether the subordination was a waiver of lien.

Judge Swollenbach: And the second affirmative defense is they should look to other security before proceeding against you.

Mr. Sanders: Yes, your Honor.

Judge Swollenbach: All right, Mr. Erickson.

Mr. Erickson: In this case involving the sale and the handling and disposing of the Brisky fruit, the fruit of George Brisky, for the year 1937, the Government in this case will attempt to show that the fruit crop of [36] the Brisky orchards was delivered to the Pacific Fruit Company some time during the early part of the harvesting and packing season of 1937, and that it constituted in the vicinity of between eleven and twelve hundred boxes of various sizes, grades and quality of apples,

being some fancys, some extra fancy, 'C' grade, varying in size from 150 to 234 and 252 to the box in the pack out. The contention of the Government will be that under the provisions of the subordination agreement referred to that the United States had a lien upon this fruit crop of the proceeds from that fruit crop except in so far as that lien was insubordinated, basing that upon the wording of the subordination agreement, reading:

“And, Whereas, the said mortgagor is in need of additional funds for the purpose of spraying, picking, sorting, washing, wrapping, packing, transporting, warehousing, and/or his fruit fruit crop and has applied to the Pacific Fruit & Produce Co. Cashmere, hereinafter called the Creditor for a loan for any and all of these purposes, Now, therefore, for and in consideration of a loan or advance made or to be made by the Creditor, The United States of America, acting by and through the Secretary of Agriculture, does hereby subordinate the Chattel Mortgage above described to any and all liens upon the Mortgagor's fruit crop for the year 1937 hereafter created by the said mortgagor in favor of the Creditor to secure said loan, provided, however, that such subordination shall be limited to the extent of sixty cents per box on all fruit sold by the mortgagor, and does specifically agree that the creditor shall have the right to deduct and receive from all sales made by the said mortgagor of his 1937 crop the sum of sixty cents per box from each

sale made by him until the loan made by the creditor shall have been paid in full."

It is our contention that each sale stands upon its own merits, and, consequently, the highest amount that would be due and owing to the Government would be on the sale of the Extra fancys, and has practically nothing to do or practically nothing due and owing to the Government [37] on the sale of 'C' grades, for instance, because of the low price prevailing on 'C' grades, which is generally less than sixty cents per box. It is also our contention here the wording of the subordination agreement must be construed to the effect the sixty cents a box takes care of everything, that is, it includes warehousing, picking, sorting, wrapping, transporting, marketing, storage and everything consistently chargeable against those apples, that is, the warehouses are not permitted to set up any additional expenses to add onto the sixty cents a box, making the charge 65 or 75 cents a box, but that the sixty cents is the total limit to which the Government of the United States will subordinate its lien.

Now, our evidence will show that our men from the Farm Security Administration went to the Pacific Fruit Company to view the books of the Pacific Fruit Company and find out the sale price of those apples, and that the Pacific Fruit Company's books were unsatisfactory to these men. They looked them over. The books did not show where the Pacific Fruit Company sold these apples—or to which

consumer, which retailer bought the apples. The books merely showed certain prices that they claimed they had sold these apples to another Pacific Fruit and Produce Company warehouse in some other vicinity of the United States. And it was impossible to gain anything more from the books. Then the Farm Security Administration accountant copied down certain figures from these books and didn't say they were satisfactory or didn't say anything—that that was a complete accounting—or words [38] to that effect, but merely took down the figures for study and analysis of what they were worth. It appeared from an examination of the books that the Pacific Fruit Company had quoted net price, that is prices less the storage less the advertising, less the marketing to the extent of about 22c a box, in other words quoted a price of 50c a box and had really sold that fruit for 50c plus 22c or 72c a box, but had reported just the net selling price, and that selling price was wholly outside of the scope of the subordination agreement, which was the transaction between the grower and the Pacific Fruit Company and the Government or the limitation of authority there on the Pacific Fruit Company warehouse.

The evidence will show that these sales were made from October, 1937, on into the year 1938, about the last part of February, or the first part of March, 1938. The evidence will also show the Pacific Fruit Company listed a good many of the sales as Jonathans, whereas the sales really were Delicious apples, as will be verified from the grower's memo-

randa, sheets that the Pacific Fruit Company sent to the grower Mr. Brisky when he sent the apples into the Pacific Fruit Company, and Delicious apples are worth or were worth considerably more than Jonathans and they reported a certain number of those sales were Jonathan apples.

The evidence will further show that the Pacific Fruit Company at all times has never given any more figures—have never thrown any more light upon these transactions than they did at the first time the Farm Security Accountants [39] were permitted to go there and copy down these figures. It will be the purpose of the Government in this case to call the manager of the Pacific Fruit Company to the stand and ask him questions about the sales of this fruit, the dates and varieties and warehousing charges, and whether or not these were net prices or gross prices that he reported and accounted for as selling. Then we will introduce evidence based on the market price of fruit in the community at the time these sales were made. We have an expert here who was acquainted at that time with the day to day selling price of fruit of particular grades and varieties. It will be his purpose to testify the prices quoted by the Pacific Fruit were under the prevailing market prices in the community at that particular time on the particular grades and varieties of fruit that were sold, and that, in substance, will be our theory of the case; that the Pacific Fruit should account for each sale independently of the other sales, and are not entitled to take and average all the ‘C’ grades and

all other fruit thruout the season and then say they will pay the Government what is over sixty cents a box and account to the Farm Security Administration for that. They must stand on the individual sales and account on the individual transactions and if the sale brings under sixty cents a box they don't owe the Government a thing, but if the sale should be over sixty cents a box they must account to the United States for that sale and are not entitled to make other deductions except what is mentioned in the subordination agreement. [40] That is substantially what our proof will be. I will suggest to the Court that our Farm Security Member of the bar in Oregon is here to help me with this case and I understand the Court rules to be it is not necessary that he be admitted for a single case.

Mr. Sanders: I think Counsel right off the reel has misunderstood the agreement that the Government signed subordinating the fruit. Counsel said we have not accounted for what we sold that fruit for. Now, I don't see anything in this agreement requiring us to disclose what we sold the fruit for—nothing in there at all. That agreement here says and our evidence is going to show, when Mr. Brisky came in we said 'do you want to sell your fruit?—if you do we will buy it from you' and on certain dates he came in and says 'I want to sell some more fruit' and and on the dates we bought the fruit from him——

Judge Schwellenbach: Is that consistent with your admission in your answer—Paragraph VIII

—“ * * * after the execution of said subordination agreement it advanced to the borrower funds”——

Mr. Sanders: Yes, we advanced to this grower. The Government didn't give them enough money to raise the crop as the Government alleges and he came in to us and from time to time we advanced him money on his crop. When his crop was harvested we asked him do you want to sell it—. Some of those apples he wanted to sell in bulk as loose apples and we bought them that way. Some of them he wanted us to wrap and pack them there, for which we [41] made a charge against him for wrapping and packing, then at such time as he wanted to sell we bought the apples at the market. We do not sell as commission merchants. We bought those apples off of the farmer for our own account and sell them for our own account. This subordination agreement does not say anything about our sale price—it says: “* * * does hereby subordinate the chattel mortgage * * * such subordination shall be limited to the extent of sixty cents per box on all fruit sold by the mortgagor * * * ”—by Brisky, not by the Pacific Fruit— “* * * and does specifically agree that the Creditor shall have the right to deduct and receive from all sales made by the said mortgagor of his 1937 fruit crop the sum of sixty cents per box from such sale made by him until the loan made by the creditor shall have been paid in full.” Now, there is absolutely nothing in that that says that we have to account for what we

sell the fruit for, or where. It's what the mortgagor sold the fruit for. Now I realize in the bulk of these cases where a commission merchant is merely the agent and he sells to somebody else he is merely doing it as agent for the grower, but that isn't true in our case. In this case when that fruit comes in we buy that fruit and give him credit for it right at that particular moment. He is given credit for it. The farmers had agreed to pay a cent a box for advertising, so when the Government auditor came in they took and upped the prices to cover the advertising, and all the prices here are higher than what is shown on the credit on our ledger. [42]

Now, then, so far as the business about Delicious or Jonathans he seems to make a point there was some skullduggery about that. Our ledger shows them to be Jonathans. Now if there is a mistake—who made the mistake—There is no attempt to conceal—we bought Delicious and our ledger shows it. We bought 189 boxes of Delicious. Our evidence will show that as the farmer came in we did the varying processes called for by the subordination agreement. We advanced the money—or services—and bought the fruit outright and credited our ledger page with the purchase price of the fruit. We ultimately sold that fruit—some of it we took a licking on and some we made a profit on—but that doesn't go into the customer's ledger. That is our business. We are not a commission merchant. We are not a cold storage plant. We own a cold storage plant for the benefit of our other branches because we are

nothing more or less than the buying agent. Our local branch is the buying agent to take care of our other branches, and also we do sell in car load lots directly all over the world from there, but these sales are purely our own sales. Now, these dates he has. Those are not the dates we sold the fruit, those are the dates the farmer came in and said 'I want to sell' and we said 'all right—we'll buy.' Those aren't the dates we sold on. We sold out of Chelan county—we sold some 600 boxes of apples. When the subpoena came in Saturday I spent until six o'clock Sunday—I went up there—and couldn't locate all 600—we thought when the Government had taken the audit that was the end of it—this is the [43] first time we knew the people that came in didn't get the information they wanted—the information was all there—they had everything they asked for—it was right there. We thought we had made an accounting to the Government on that and we submit it is the sale price by the grower and not the sale price by the Pacific that controls, and these figures are true and accurate figures, and they are reflected right on the books of the company. And we also take the position that while it may be true the Pacific may have converted the proceeds of the fruit, we contend we are not guilty of conversion and not guilty of breach of contract, and I say again we are not agents. We buy and sell as principals only. We submit they are not entitled to go into the question of our sale price of the apples.

Whereupon

C. D. RAINES,

a witness called for and on behalf of the plaintiff,
having been duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Your name is C. D. Raines?

A. That's right.

Q. What is your business?

A. Manager of the Pacific Fruit and Produce
Company.

Q. Where is your place of business located?

A. At Cashmere.

Q. During the year 1937 were you likewise manager of the Pacific Fruit and Produce Company?

A. Not at Cashmere. [44]

Q. You were at Chelan Falls then?

A. No.

Q. Where were you? A. Dryden.

Q. The Dryden branch has been abandoned now and all the business handled thru your present branch, is that correct?

A. That's right.

Q. Well, during the year 1937 you were engaged in the apple business at Dryden?

A. That's right.

Q. In the vicinity of Dryden.

A. That's right.

Q. And you bought apples—dealt in the apples raised in the community there?

A. In the Dryden district, yes.

(Testimony of C. D. Raines.)

Q. As such you had business transactions with George Brisky and Evelyn Brisky?

A. No, sir.

Q. During the year 1937 did you not?

A. No sir.

Q. You had no business relations with the Briskys at all? A. I did not.

Q. Did you handle the fruit crop raised by the Briskys? A. I did not.

Q. Who did?

A. My predecessor, Charles F. Cochran.

Q. Where is he now? [45]

A. At Cashmere.

Judge Schwellenbach: You mean your predecessor in your present position?

A. That's right.

Mr. Erickson: Q. And at that time in 1937 you were working in the warehouse there?

A. In Dryden, yes.

Q. And he was manager?

A. He was the manager at Cashmere—I mean Mr. Cochran.

Q. As such were you acquainted with the Briskey transactions? A. I was not.

Q. Do you have the books and figures covering the Briskey transactions with you?

A. Mr. Sanders has it.

Mr. Erickson: (To Mr. Sanders) May I see them?

Q. I hand you what has been marked 'Plaintiff's identification 'A' and ask you to state what that is.

(Testimony of C. D. Raines.)

A. These are the ledger sheets of the Brisky account 1937-'38 season.

Q. By the way, you were manager of the Pacific Fruit Company at Dryden during 1938, were you not, when the auditors of the Farm Security Administration were there?

A. No, I came into Cashmere in May, 1938.

Q. Were you present when they made the audit?

A. Yes.

Q. You went over the figures you had with them?

A. Not me personally—our auditor did.

Q. That was Mr. Barrett? [46]

A. That's right.

Q. Explain briefly what these figures represent.

A. Well, Mr. Erickson, they are just nothing but credits and debits—credit for fruit.

Q. These sheets represent transactions with Mr. Brisky?

A. So far as I know, yes.

Q. These represent the disposition of that fruit.

A. That's right.

Q. And the charges made against that fruit for spraying material.

A. That's right.

Q. And packing?

A. That's right.

Q. Boxes?

A. Yes.

Q. According to this memorandum the last sale was made to George Brisky on February 28th, or thereabouts, was it not?

Judge Schwollenbach: Sale to Mr. Brisky?

Mr. Erickson: No, I will strike that—the last sale or disposition of this fruit made by the Pacific Fruit Company was on February 28th——

(Testimony of C. D. Raines.)

Mr. Sanders: Now, I object to that question. The question as to when the Pacific Fruit and Produce Company disposed of this fruit isn't before the Court. The question is when did the mortgagor dispose of the fruit. According to the terms of the subordination we are to account for the sales by the mortgagor and not by the Pacific Fruit. [47]

Judge Schwellenbach: I may agree with you when we get thru but I am trying this case, one of the many causes of action and I am going to be rather liberal to letting the testimony go in. It may go in subject to your objections, but I am not going to pass on that legal question at this time.

Mr. Sanders: May it be understood we object to all of these matters without interrupting each time?

Judge Schwellenbach: Yes. I will overrule the objection.

Q. You stated that you didn't have any personal knowledge of these transactions with Mr. Brisky—do your books and records show that Mr. Brisky asked you to sell these apples on certain dates, or not?

A. I didn't have any dealings with Mr. Brisky.

Q. I am asking whether the books or records show that.

A. This is all we had—these ledger sheets.

Q. They do not show that Mr. Brisky requested you to make these sales from day to day—

Mr. Sanders: He is assuming something not in

(Testimony of C. D. Raines.)

evidence—that is entirely contradictory to the pleadings.

Mr. Erickson: It's according to your opening statement——

Mr. Sanders: No, I said Mr. Brisky sold those apples to us—requested us to buy them. Mr. Brisky did request us to sell them—Mr. Brisky requested us to buy it.

Mr. Erickson: I will withdraw my last question.

Q. I will ask you whether or not your books and records stated that Mr. Brisky asked you to buy this fruit from him from day to day? [48]

A. The ledger sheets do not show that.

Q. Does any memorandum you have show that?

A. There might be some—I haven't them here.

Q. Did you examine your memoranda for that?

A. No, I did not—there might be a short form contract—but I don't know.

Q. So far as you know Mr. Brisky did not ask this company to buy this fruit from day to day as those individual sales would show on this ledger sheet?

A. I wouldn't know.

Q. After you secured that fruit from Mr. Brisky what did you do with it?

A. I had nothing to do with that deal.

Q. What did the warehouse do with it according to your books?

A. Probably shipped it to one of our branches.

Q. Do you know which one?

A. We have them all over the United States. I wouldn't know now.

(Testimony of C. D. Raines.)

Q. Doesn't your branch keep any records of where the fruit was shipped to?

A. Yes, we have car files which might show where some of it went. Might be commingled with several shipments—or might be a 600 car load.

Q. The Brisky fruit was commingled with other fruit?

A. After we bought it.

Q. And that was sold to other branches of your warehouse in other parts of the United States?

A. That is right. [49]

Q. Well, as a matter of fact one branch of the Pacific Fruit Company doesn't sell to another branch, does it?

A. Well, I am a branch and I sell to a branch—I sell to our jobbing houses.

Q. You sell to the jobbing houses?

A. Yes, or ship to them.

Q. Well, what price do you use when you sell?

A. The market price.

Q. And its the market price in the community—in Wenatchee.

A. Its a day to day deal——

Q. Market price, you understand, is what the seller is willing to sell for, but is not forced to sell, transfers to a buyer willing to buy and not forced to buy, isn't that what you understand by 'market price'?

A. You buy apples for cash for so much, tomorrow it would probably be more or less. A grower comes in and wants to sell his apples—

(Testimony of C. D. Raines.)

I say 'I'll give you a dollar a box'—and the next day somebody else comes in and the price is lower and I might give him 90c—it depends on the market.

Q. What determines the market?

A. I don't.

Q. You keep a certain marketing service at your disposal, do you not?

A. Not myself, no. Our jobbing houses tell us mostly what they are willing to pay.

Q. So another Pacific Fruit Company tells you what they are willing to pay and you sell to that house for [50] what they are willing to pay?

A. I ship to them.

Q. Is that an actual transfer of money between your Pacific Fruit branch and the other Pacific Fruit branch?

A. No.

Q. How is the transaction handled?

A. Thru inter-branch.

Q. Just a bookkeeping transaction?

A. That's right.

Q. There is no transfer of money at any time even at the end of the year?

A. No.

Q. What determined the price you were willing to pay the grower?

A. Well, its—if the price is out of line we stay out of the deal. If its too high we stay out. I think they all have practically the same price.

Q. You pay the grower practically the same price as the other apple warehouses?

(Testimony of C. D. Raines.)

A. About the same. We are all about the same.

Q. You pay your grower what your jobbers quote the price to you—by any chance?

A. He don't quote the price. He tells us about what the market is. The boys in Seattle know about what the price of apples is—about what they can sell them at retail.

Q. Your other branches quote the price to you at which they are willing to buy apples from you.

A. They tell us about what the market is in their [51] locality and what they can pay for the apples.

Q. And tell you whether they want any or not.

A. Thats right.

Q. Then you see whether or not you can buy from the grower at that figure.

A. Thats right.

Q. If you can buy from the grower at that figure, then you make a purchase from the grower.

A. Thats right.

Judge Schwellenbach: Do you always have your orders in before you buy? A. Not always.

Q. Supposing you had a car of apples over there for which you paid a dollar, and the price was down the next week and the Seattle office should call up and say 'send us some apples at 95c' would you carry the 95c?

A. We don't have to deliver if the price is less than we paid for them.

Mr. Erickson: Q. The figure then that you can

(Testimony of C. D. Raines.)

transfer to another house determines to some extent what you offer your grower.

A. I don't know as I follow you.

Q. For instance, if you have a house in Minneapolis and offers a dollar a box, that price is controlling what you offer to buy them from your grower.

A. They tell us what the market is. If the market is a dollar they tell us about what the market is. They don't tell me to go out and buy at a dollar—they tell us that is the market at Minneapolis. [52]

Judge Schwellenbach: Do you figure on a profit from your branch?

A. Just warehousing charges.

Q. If you pay a dollar for them you will not be compelled to sell to the other branch for less than a dollar.

A. Some times we have to if the market keeps on declining.

Q. And a temporary fluctuation.

A. We don't have to, no.

Mr. Erickson: Q. Well, you quote your grower a certain price then you add onto that price something, do you not, before you sell to your other house? A. Just warehousing charges.

Q. How much are those warehousing charges?

A. Usually a dime.

Q. You also add on storage charges?

A. No, we do not.

(Testimony of C. D. Raines.)

Q. How do you figure storage if you have apples handled in cold storage?

A. Well, if you own them you can't charge storage for fruit you own.

Q. Supposing the grower hasn't sold to you.

A. It doesn't make any difference.

Q. You say the warehousing charge is ten cents?

A. You usually charge a dime for warehousing.

Q. What does warehousing consist of?

A. Loading and inspection—assembling.

Q. Doesn't include advertising or storage.

A. Not storage, no. The grower pays the advertising. [53] We never mention advertising because it's a thing he knows—he knows he has to pay the advertising.

Q. If the market on apples should rise suddenly would you quote the same price to your other jobbing houses?

A. I might raise the price a little bit.

Q. Over ten cents?

A. Yes—naturally every manager tries to make a little money, you know.

Q. Then you will average this ten cents a box over what your branch in some other community will pay. That is the charge.

A. Not on a declining market.

Q. I mean the average circumstances without the market declining.

A. Not the last seven years—the last four years.

Q. But this ten cents a box is added.

(Testimony of C. D. Raines.)

A. I try to make that much, yes—sometimes I can't do it.

Q. Does your branch sell to any other outside fruit companies not connected with the Pacific Fruit?

A. Occasionally we sell an outside car.

Q. You sell those at a greater price than you do to your other branches?

A. If I buy a box of apples for a dollar I try to sell at a dollar ten or a dollar fifteen, or whatever I can get on an outside sale.

Q. If your other house in Minneapolis tells you they are willing to pay a dollar a box what price do you quote the grower? [54]

A. I try to buy it at ninety cents.

Q. Then you add the ten cents on and quote the Minneapolis house a dollar.

A. If he says he will pay a dollar I try to buy for ninety cents.

Q. Well, is the price you quote the grower the gross price or the price less storage and other charges?

A. When I buy from the grower I tell him I buy at a dollar a box—that's all there is to it—he gets the dollar or the ninety cents whatever I quote the grower. Storage has nothing to do between me and the grower. If I buy the apples from him for ninety cents I give him ninety cents.

Q. Supposing the grower puts in a shipment of apples, or a thousand boxes of apples in your ware-

(Testimony of C. D. Raines.)

house on the first of November and keeps them there until the first of April, how do you handle the transaction then?

A. Depends on what kind of a deal he makes to the grower.

Q. If the grower wants to place them in storage without selling would you take them on those conditions? A. If I have space I will, yes.

Q. And if the grower wants to sell at any time you buy from him at the market price.

A. Any time he wants to sell them, that is, unless the prices are too low or over stocked or too large an inventory.

Q. What about storage charges in that event—supposing [55] he went to you the first of April to sell.

A. If he was an independent grower and wants storage space and I have space available I charge him storage rates. We have nothing to do with selling them or handling them, just storage alone. We haven't commercial storage.

Q. There is a standard charge of approximately 18c a box in cold storage from fall to spring?

A. There is not.

Q. What is that charge?

A. It runs from ten cents up to sixteen cents.

Q. What was it in '37?

A. I wouldn't know.

Mr. Erickson: That's all.

(Testimony of C. D. Raines.)

Cross Examination

By Mr. Sanders:

Q. You said that if an independent grower wanted to store apples in your warehouse and you have space you will take them in and charge him the regular storage rate. What do you mean by that—by an independent grower?

A. I mean—a lot of the growers—or growers usually sell in May and June and are not interested in selling to, maybe, the Pacific Fruit—but they want storage space and if available I charge regular storage rates, but no connection outside of just storage.

Q. Those are not what you consider your source of supply? A. No.

Q. You have a regular source of supply from which [56] you obtain apples from year to year?

A. Thats right.

Q. And when you obtain your apples from that regular source do you charge them any storage?

A. I do not.

Q. Now, then, you said that when some other branch quotes you that apples are worth, say, a dollar you try to buy them at ninety cents. Is that the general rule or is that an exception? In other words, do you have apples of your own in stock as a rule or go out and buy them as they come?

A. Both ways. We usually have a small inventory, then we keep buying, keep our inventory up.

Q. Whenever a farmer wants to sell——

(Testimony of C. D. Raines.)

A. I go and buy.

Q. You immediately buy at that time.

A. Yes.

Q. And you take it out of your stock if available?

A. Yes.

Q. And if you haven't it available——

A. I go out and buy it from some other grower. These orders come in for mixed varieties which takes a dozen different growers or lots to fill one order some times.

Q. And thats what you had reference to in answer to the question when the other branch quoted you to go out and buy.

A. Most of our business is mixed varieties—everything in it from Jonathans down to winesaps—all varieties and its pretty hard to have all of these in stock and have to go out and buy a few to fill the car. [57]

Q. At the time you get the orders in do you own the major part of the apples that will go in that car?

A. Yes.

Q. Now you were asked if you tried to add on warehousing charges of ten cents for your branch there. Now, looking specifically at 1937 what was the result of the apple crop in 1937?

A. I sold them for about twenty or twenty five cents less than I bought them for.

Q. Did the branch make any profit on the 1937 crop?

A. Definitely, no.

Q. When the 1937 crop—(To Mr. Erickson)

(Testimony of C. D. Raines.)

Have you offered this in evidence (referring to plaintiff's identification 'A'—ledger sheets).

Mr. Erickson: No. I will offer that in evidence.

Judge Schwellenbach: It may be admitted.

Q. The figures shown on plaintiff's Exhibit 'A'—they are the figures at which you bought the fruit. A. Yes.

Q. When I say 'you' I mean the Pacific Fruit, and not you personally. And would you say that the price at which that fruit was ultimately sold by the Pacific was above or below those figures?

A. Between buying and selling?

Q. Yes. A. Below.

Judge Schwellenbach: You mean the Minneapolis branch sold for less?

Mr. Sanders: No, this branch here sold them below [58] to the other branches or outside customers.

Judge Schwellenbach: This sheet doesn't show the amount the branch got then?

Mr. Sanders: No. This sheet shows what they bought them for. Only the dealing with the Briskys because from then on they were the Pacific Fruit's. I am asking the witness when the Cashmere branch sold either to outside trade or another branch if they went out at a price higher or lower than was paid to Brisky.

Witness: I said lower.

Q. The dates shown on here are the dates at which you acquired the fruit. Are those the dates

(Testimony of C. D. Raines.)

that this branch shipped the fruit either to an independent buyer or to another branch?

A. Yes.

Q. Are they the dates that the fruit actually passed from the Pacific Fruit and Produce company?

A. I don't think I got your question.

Q. The dates as shown on there are they the dates on which the title of the apples ultimately passed from the Pacific Fruit and Produce Company either to some independent buyer or to some other branch?

A. Those are the dates the credit was extended to the grower.

Q. They are the dates you bought from the grower.

A. That's right.

Q. They have no relation to the dates the Pacific Fruit Company sold the fruit to somebody else.

A. None whatever. [59]

Judge Schwellenbach: You say the dates are the credits——

Mr. Sanders: Those are advances made to the grower—the debit is the money advanced.

Witness: The debit side are the advances made to Mr. Brisky, and the second column is the credit and the dates the fruit was credited on his account.

Q. (Mr. Sanders) I believe counsel asked you if you were present at the time the Government auditors were in your place and made an audit of the 1937 purchases.

A. I was there, yes.

(Testimony of C. D. Raines.)

Q. And at that time you were the manager at Cashmere? A. That's right.

Q. Did the auditors at that time make any protest as to the co-operation you gave them?

A. Not to me.

Q. Did they ask for any records that were not furnished to them?

A. I gave them everything they asked for.

Q. And they had at that time the sheets from you for the purchases or the advances you made and the sheets showing the fruit that was delivered to you and they had all the credits and debits shown on that Brisky report? A. Yes.

Q. The original documents showing that.

A. That's right.

Q. And they asked for no further data at all?

A. Not to me, no sir.

Q. (Judge Schwollenbach) Did they ask the auditor for [60] anything that you know of?

A. I don't know. I was in and out at the time.

Mr. Sanders: Our auditor that was present is in court your Honor.

Q. The prices as shown on Exhibit 'A' as credits to the grower are higher than they would have been had you handled them as a commission merchant and credited him as of the date you actually moved the fruit out of the warehouse, is that correct? A. That's right.

Q. Now, he was asking you about the cash transactions—so far as the cash transactions be-

(Testimony of C. D. Raines.)

tween the different branches its very similar to a bank clearing house, isn't it, where each goes into a common clearing house?

A. Yes. Inter-branch clearing.

Q. Then each bank gets credit from it.

A. That's right.

Mr. Sanders: I think that's all.

Redirect Examination

By Mr. Erickson:

Q. Have you any records about the selling price of this fruit to your different branches?

A. Well, they might be recorded, I don't know.

Q. Have you made an effort to secure them?

A. Well I went thru quite a number of car orders. You see we shipped about 600 cars of fruit that year and its pretty hard to tell just what the selling price was.

Q. Approximately?

Mr. Sanders: I might say I personally spent all day [61] Sunday until a quarter to six, and I do have in my files here a number of them, although I haven't them all. We located some 150 of the sheets for the six hundred cars, and I laboriously went thru and picked out a great many of them which I would be glad to submit to you, if you wish.

Mr. Erickson: It would be impossible from this to tell what this branch transferred it to the other branch at.

(Testimony of C. D. Raines.)

Discussion

Judge Schwellenbach: You may take those sheets during the noon hour and see what can be abstracted from them. Figure them out on your own time.

Mr. Sanders: I have some 150 car files. It would take days to go thru them.

Judge Schwellenbach: You can use the noon hour.

Q. (By Mr. Erickson) Was George Brisky a regular client of the Pacific Fruit Company?

A. I don't know.

Q. Has he been a client since 1937. Have you dealt with him continuously?

A. No, I have not.

Q. Now, your figures on this ledger sheet there showing the debits—they represent the amount you advanced Mr. Brisky? A. Thats right.

Q. They represent your total advances to Mr. Brisky for 1937?

A. So far as I know, yes. [62]

Q. Do those prices on that sheet show prices before or after advertising charges have been deducted? A. I couldn't tell you that.

Mr. Sanders: I can answer that question, if you wish, because I checked it personally. The advertising has been taken off of there. I personally made a computation.

(Witness excused.)

GEORGE BRISKY,

a witness called for and on behalf of the plaintiff,
having been duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Your name is George Brisky? A. Yes.

Q. Where do you live? A. Cashmere.

Q. And you have lived there for a number of years? A. About thirty seven.

Q. And have been engaged in the fruit business for the last several years? A. Yes.

Q. During the years '36 and '37 you had some dealings with the Farm Security Administration of Portland, Oregon. A. I did.

Q. And obtained some loans from the Government. A. I did.

Q. And gave a mortgage covering the fruit crop raised in '37 to the Farm Security Administration. [63] A. Yes.

Q. Where did you sell or dispose of your 1937 fruit crop?

A. To the Farm Security Administration.

Q. You don't mean that, do you?

A. No, I misspoke myself—you were talking about the Farm Security—I meant to the Pacific Fruit and Produce Company.

Q. How was that handled, Mr. Brisky?

A. Well, I can't exactly remember whether it was consignment or cash——

Mr. Sanders. The witness says he can't remember—I object to him guessing.

(Testimony of George Brisky.)

Judge Schwellenbach: If he can't remember whether it was consignment or cash he can't very well testify.

Q. Do you know what kind of a deal you had with the Pacific Fruit Company in 1937?

A. Well, I think it was consignment—I dealt with them in 1938, and I have got prices on certain boxes and varieties and if I sold them in '37 for cash it should have been the same.

Mr. Sanders: I move the answer be stricken. It shows he doesn't know. He is merely guessing.

Judge Schwellenbach: I will not strike it for the present. I will let it stand until Mr. Erickson questions him further.

Mr. Erickson: Q. I hand you plaintiff's exhibit marked for identification 'B' and ask you to state what that is. [64]

A. That's the statement for 1937, I guess.

Mr. Erickson: I ask at this time that the plaintiff's identification 'B' be received in evidence.

Mr. Sanders: No objection.

Judge Schwellenbach: It may be received.

Q. These sheets marked Plaintiff's Exhibit 'B', state where you received them.

A. From the Pacific Produce.

Q. They were delivered to you by the Pacific Fruit & Produce Company? A. Yes.

Q. And these sheets, as you say, represent your transactions with the Pacific Fruit for 1937?

A. Yes.

(Testimony of George Brisky.)

Q. And it begins in August—on August 2, 1937, and shows the debits and credits to the Pacific Fruit does it not? A. Yes.

Q. Do you remember what arrangement you had with the Pacific Fruit and Produce Company now—what conversation you had with the Pacific Fruit people? A. You mean in 1937?

Q. Before you entered into this agreement with them.

A. I don't remember any conversation with them. As well as I remember they taken the fruit on consignment.

Mr. Sanders: Just a moment—he said he doesn't remember. That is strictly contrary to the exhibit you have just introduced.

Judge Schwellenbach: I think it goes to the weight. [65] The testimony does not have any particular value when his first answer is he doesn't know whether he had consignments or sales, and then he says "I think I have consignments"—it will be received for what its worth.

Witness: All my papers—when I sell for cash I get a sheet back like that from not only the Pacific Fruit but the rest of the warehouses—the price is quoted. When I got my return on that there weren't any and that leads me to believe it was consignment.

Q. Did you have a conversation with the Pacific Fruit and Produce Company about the sale of that 1937 crop?

(Testimony of George Brisky.)

A. If I consigned to them——

Mr. Sanders: Just a moment——

Judge Schwellenbach: I will sustain the objection. That would be purely argumentative.

A. I must have had some kind of a conversation with them.

Q. Were you consulted at the time these apples were sold? A. No.

Q. When were these apples delivered by you to the Pacific Fruit Company?

A. Oh, I delivered them at different dates; as I picked them. I hauled them in. I couldn't tell what dates. As long as I picked them.

Q. That was during the harvesting season?

A. Yes, when I got them harvested—they were all in by the time I got them harvested. [66]

Q. Do you remember when you got these returns, plaintiff's Exhibit 'B'—what time it was?

A. No, I don't. Some time after Christmas.

Q. Well what was said to you or by you?

Mr. Sanders: He already answered he doesn't know.

Mr. Erickson: I don't think he has answered this question. I haven't asked it yet.

Judge Schwellenbach: Mr. Erickson said he hadn't completed the question yet.

Q. What was said to you or by you to any member of the Pacific Fruit Company touching on your receipt of money concerning this 1937 fruit crop, or disposition of that fruit?

(Testimony of George Brisky.)

A. Well, I understood——

Mr. Sanders: Object to what he 'understood'.

Objection sustained.

A. Well, I told them to sell on account of the mortgage on the crop——

Q. Did you tell the Pacific Fruit anything as to any amount of money you expected to receive from the crop?

A. I told them I was allowed sixty cents a box for harvesting the crop, see——

Judge Schwellenbach: Who told you that?

A. Charley Cochran.

Mr. Erickson: I refer you to Plaintiff's Exhibit 'A', the memorandum sheet covered by 'B'—referring you to both 'A' and 'B' this check dated August 2, 1937, for \$50—what is that, do you know? Is that an advance to you by the Pacific Fruit? [67]

A. I don't know.

Q. Well, then, this item marked August 10, 1937, 'Red Drum 5 g fish oil' and so on, \$41.67, do you know anything about that item? A. Yes.

Q. What was that?

A. For the freight on it.

Q. Then August 10, 'Recording crop mtg—\$50'—and August 10, '2 gal Fish oil—for g red drum' \$3.82 those were advances made to you by the Pacific Fruit Company? A. Yes.

Q. Then August 31, we run into some credits—those were pears? A. Yes, Bartletts.

Q. Then the debits start in again in September.

(Testimony of George Brisky.)

There is a \$20 check—do you know what that is?

A. I imagine that was for harvesting.

Q. Then we get down here to October 16, 1937, it says '163 Jon. culls—\$11.08' explain that item.

A. That would be culls I suppose what was left after—left over out of the pack.

Q. Then we come down to October 30th—'10 F & F Jons \$2.90' credit—what does that mean?

A. That would be the sale price I imagine—the way I take it.

Q. Then we come down here to November 10—'1088# Spitz culls \$2.72' that represents the payment to you, does it not? [68] A. Yes.

Q. And then there are additional culls, 6.80, 21.42 and 2.41—and then in December the records show you sold six boxes of large Romes and were credited 1.58 at that time, does it not?

A. Yes.

Q. Then 14 boxes of Romes, 8.26, then 189 Delicious at \$135.64 less advertising charge and storage—do you remember anything about that?

A. I know if they were not I wouldn't have to pay the storage—if they were consigned I would pay the storage—if I sold for cash I would sell all at one time like the rest would.

Q. Then there is additional sales of Jons 15.60, and Winesaps, 78.90, and sales of Romes—and so on—. Now by refreshing your memory by that memoranda can you tell us anything more about your relations with the Pacific Fruit Company—

(Testimony of George Brisky.)

about the sale of those apples and the disposition of them?

A. No, I am afraid—its too far back for me to remember.

Q. State whether or not you remember of giving authority to the Pacific Fruit Company to sell any part of your fruit—

Mr. Sanders: If your Honor please he has already said he doesn't know.

A. No, I know I didn't—I never give them authority to sell at any time.

Judge Schwellenbach: He said they never asked him [69] about selling them. The issue was never raised.

Q. Well, Mr. Brisky, state whether or not on any occasion you purchased any fruit from the Pacific Fruit for your own consumption.

A. Yes, I bought a couple of Jons, I think—in fact, I know I did. I think that was all.

Q. Do you know what date you bought those?

A. No, I don't. I know it was in the fall some time.

Q. Do you know what kind of Jons they were?

A. Extra fancy, I think.

Q. Look at plaintiff's Exhibit 'A' and see whether you can find two boxes of fancy Jons there—extra fancy.

(Whereupon the trial was adjourned to reconvene at 1:30 P.M., at which time, all parties present, the trial was resumed. Witness

(Testimony of George Brisky.)

Brisky on the stand for continued direct examination.)

Q. Mr. Brisky, right before lunch I think we were talking about the purchase you had made for gift purposes of two boxes of apples from the Pacific Fruit and Produce Company. Look at Exhibit 'B' here—when would you say that purchase was made? Look at the dates in this column.

A. Well, I would say it was right before Thanksgiving.

Q. Well, refreshing your memory, the date shown here is October 30th, two extra fancy Jons, 1.50—would you say that was the purchase?

A. Yes, thats what I paid for them.

Q. State whether or not in the accounting to you you were given credit for 75c a box for— [70]

Mr. Sanders: Oh, if your Honor please—I object to that. Here he comes in and buys two boxes of extra fancy Jonathan apples for gift purposes and now wants to know if he was given credit for that. In the first place this witness never testified he bought two boxes of apples—

Judge Schwollenbach: I don't think you can prove your prices if a person goes and buys two boxes at a time for gift purposes—

Mr. Erickson: No, I just wanted to show for instance purchases this report of sales here did not list the true prices.

(Testimony of George Brisky.)

Judge Schwellenbach: Where you buy two boxes at a time for gift boxes every one knows when you buy them that way you pay more for them—I don't think that is any standard by which you can show the sale of boxes of apples by the car load. I will sustain the objection.

Q. Now, referring to an item dated December 18, 1937, listed 413 Extra "C" Fancy Jons, storage 8c—can you explain that item?

A. Well it should have been storage only on consignment. If they bought them—they bought them in October and I shouldn't have to pay storage on their fruit.

Q. Have you examined the number of boxes reported in Plaintiff's Exhibit 'B' here—have you examined the approximate number of boxes or number of boxes reported in this exhibit?

A. Yes, I went over the amount.

Q. Do the number of boxes reported here account for all the fruit raised on your farm in 1937— [71]

Mr. Sanders: If your Honor please, that is immaterial.

Judge Schwellenbach: You should say 'and delivered to the Pacific Fruit'.

Mr. Erickson: Q. —and delivered to the Pacific Fruit.

A. Yes—I haven't checked over the Delicious in here. Yes.

Q. There is one item of 189 Delicious, January

(Testimony of George Brisky.)

28, 1938,—92 Extra fancy—82 fancy—and 14 culls—less advertising and storage—that we covered this morning. I now hand you plaintiff's exhibit for identification 'C' and ask you to state what that is, please.

A. Well, I would imagine that would be smaller than packing——

Q. What does the memorandum purport to be? Where did you receive that sheet of paper?

A. From the Pacific Fruit and Produce Company?

Q. Was it mailed to you? A. No.

Q. How did you receive it?

A. I got all my receipts at the office. I'd go down and get them from the office.

Mr. Erickson: I offer this in evidence.

Mr. Sanders: No objection.

Admitted.

Mr. Erickson: You may examine. [72]

Cross Examination

By Mr. Sanders:

Q. You sold these F and F Jons to the Pacific Fruit and Produce Company at 30c less one cent advertising, and received credit \$2.90 on your account?

A. I didn't sell them—that's what they sold them at, I imagine—it would be worth more than that——

Q. You didn't sell them to the Pacific Fruit and Produce Company?

(Testimony of George Brisky.)

A. On consignment—I didn't sell them.

Q. You testified you didn't know what the transaction was.

A. Yes, but I know I didn't sell them for 30c.

Q. A box? A. Yes.

Q. But you did receive this ticket for them on the date it bears, did you not?

A. Yes—might have been a few days after but I received that from them.

Q. Didn't they give this to you at the time you brought the apples in? A. No.

Q. What did you get when you took the apples in?

A. They packed them out and wrote that ticket after they packed them.

Q. You did receive this somewhere at that approximate date? A. Yes.

Q. Did you protest to them about the thirty cents? [73] A. No.

Q. Did you protest to the Pacific Fruit about any of this accounting?

A. Well, in one way—

Q. What do you mean?

A. I got my statement and I figured I had money coming and I told them and they told me they give it to the resettlement. I went down there and they didn't give me no credits so the Pacific still owed me.

Q. You didn't protest to them of the items on this accounting here. A. No.

(Testimony of George Brisky.)

Q. (Referring to 'B'): Doesn't this statement show a balance due from you of \$30.14—doesn't that show you owe the Pacific Fruit \$30.14.

A. It might be there.

Q. Doesn't the statement show that?

A. That's what it shows all right.

Q. Now, let me ask you this. You testified something about what the Pacific told you the Government would permit in the way of over head—what the Pacific told you was under the subordination agreement the Pacific could advance you up to 60 cents a box for raising your crop—that's what they told you, isn't it? A. Yes.

Q. And the money they advanced you was for the purpose of raising your crop, wasn't it?

A. And harvesting it. [74]

Mr. Sanders: That's all.

Redirect Examination

By Mr. Erickson:

Q. Well, did I understand you, Mr. Brisky, to say the Pacific Fruit told you they had paid the resettlement administration some money?

A. They did pay them some—I didn't get that question.

Q. I understand you said the Pacific Fruit told you they paid the resettlement administration some money.

A. Yes, they wouldn't pay it to me. They said they would pay that to them folks, the resettlement.

(Testimony of George Brisky.)

Q. Did they tell you to go to the Resettlement Administration?

A. No, I went down to get credit, and of course they hadn't got it, so I came back to the Pacific and of course they said they would pay them instead of me.

Q. Would pay it or had paid it?

A. Would pay.

Q. Would pay the resettlement?

A. Yes sir.

(Witness excused.)

HENRY WALLER,

a witness called for and behalf of the Plaintiff, having been sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Your name is Henry Waller.

A. Yes sir.

Q. Where do you reside now?

A. San Francisco. [75]

Q. What is your present business?

A. I am working with the Agricultural Marketing Administration.

Q. What was your business in '37 and '38?

A. I was employed in Washington, D. C. up to January 28th, then I was employed by the Farm Security Administration from April to August of 1938.

(Testimony of Henry Waller.)

Q. At Portland, Oregon?

A. Thats right.

Q. The Portland office is the regional office for the three northwestern states, is it not?

A. Thats right.

Q. Just what were your duties with the Farm Security Administration?

A. I was employed for the purpose of getting accountings from warehouses in the Wenatchee area.

Q. And referring to the case of the Pacific Fruit Company, and in particular to the George Brisky account, did you contact the Pacific Fruit Company with reference to that account?

A. Yes sir.

Q. Where and when did you contact the Pacific Fruit Company?

A. Sometime during May at their warehouse.

Q. Where? A. At Cashmere.

Q. Who was with you when you contacted them?

A. Mr. Nessen and Mr. Phipps.

Q. They were Farm Security Administration employees, too, were they? [76] A. Yes.

Q. Which officer or officers of the Pacific Fruit did you contact at that time?

A. Mr. Barrett was in on one of the conversations.

Q. Mr. O. R. Barrett.

A. And the warehouse manager.

Q. What was his name? A. Mr. Raines.

(Testimony of Henry Waller.)

Q. What was your purpose in contacting the Pacific Fruit at that time?

A. To get information on the amount the fruit of Mr. Brisky had been sold for.

Q. Did you get the information as to the number of boxes and the selling price? A. Yes.

Q. Will you state what conversation you had there or was had in your presence with Mr. Raines and Mr. Barrett, or either or both of them?

A. We went over the whole deal—what we wanted and both were very co-operative in giving us figures, and it finally wound up they gave us what purported to be a transcript of their books in each case—the Brisky case and other cases.

Q. I hand you plaintiff's exhibit for identification 'D', and ask you to state what that is, if you please.

A. This is an account they gave me on Mr. Brisky's fruit, showing the sales for the entire year.

Q. Who wrote that out for you?

A. As I recall the warehouse manager, or some person [77] employed by him, I have forgotten which one it was, but it was some one in the warehouse—employed at the warehouse.

Q. Was that prepared in your presence?

A. I don't believe it was.

Q. What was that represented to you as being?

A. The gross sales price on all of Mr. Brisky's fruit that went thru the warehouse.

(Testimony of Henry Waller.)

Q. For the year 1937?

A. That's right.

Q. Did you total up the number of boxes that are represented in that memorandum?

A. I did.

Q. How many boxes did that add up to?

A. I didn't notice the total on there and I don't recall.

Q. You don't have the total on here, do you?

A. No.

Q. Do you recall whether 1069 is the correct total?

A. I wouldn't recall now.

Mr. Erickson: I will offer this in evidence.

Mr. Sanders: No objection.

Admitted.

Q. I refer you to plaintiff's exhibit 'D' and ask you to explain briefly these two columns here—first, the left hand and right hand side columns—state what they mean.

A. The left hand column is the gross sales price as reported, and the right hand column is the same thing less one cent a box. [78]

Q. The right hand column then is the total of the left hand columns is that correct? There are several items combined?

A. No, its less a cent a box.

Q. Well, then, beginning with the fourth item on this page, dated December 18, 1937, listed 47 Extra Jons, 163 and large, then the price 62, then storage marked 8c, what does that mean?

(Testimony of Henry Waller.)

A. That 8c was written in later.

Q. By whom?

A. I am not sure whose handwriting that is—
but the information—

Q. Who was the person—if you don't know his
name—was he a Pacific Fruit employee?

A. No Farm Security employee.

Q. Upon what basis was that written in?

A. It was taken from sales sheets we obtained
from the grower in this case.

Q. You obtained from Mr. Brisky?

A. Thats right.

Q. Did you talk to the Pacific Fruit about that
8c, or have any conversation with any member
of the Pacific Fruit Company about that 8c?

A. I don't believe I did.

Q. You made accountings of many different
growers involving the Pacific Fruit Company in
that vicinity, did you not? A. Thats right.

Q. Over this period of time in 1938. [79]

A. Yes.

Q. Did you arrive at any conclusion about gross
prices and net prices at any time?

Mr. Sanders: Oh, if your Honor please, I don't
think that that question is proper question. Let
this witness tell what he did and what he said.

Judge Schwellenbach: I don't understand what
the question means, first.

Mr. Erickson: I want to bring out from this
witness that as he went ahead with the checking of

(Testimony of Henry Waller.)

these figures in the Pacific Fruit Company case, he found the prices were net prices instead of gross prices, but didn't understand that on the start. He found that out from the grower's statements, and what not.

Mr. Sanders: He can testify what he did—what records they had but as to arriving at some conclusion, or what conclusion he arrived at from all of this, I think its the Court's function to get the conclusion on all of this and not the witness'.

Judge Schwellenbach: I think thats right, Mr. Erickson.

Q. State whether or not you accepted the figures given you by the Pacific Fruit Company on the George Brisky account as being the correct figures?

A. I didn't have any authority to finally accept them for the Government, but I did accept them on my own account.

Q. Did you check them at a later date?

A. Yes.

Q. State when you checked them—verified them.

A. Later on in checking several other accounts after [80] I had been in the warehouse the first time.

Q. What other accounts did you check?

A. There was one named 'Joy'—I don't recall the names right now. There were several accounts in that warehouse and other Pacific Fruit warehouses.

Q. With reference to the Joy account did you check——

(Testimony of Henry Waller.)

Mr. Sanders: Your Honor, I object to that 'Joy' account. That has nothing to do with the case at issue.

Judge Schwellenbach: I take it after he got thru looking over the other accounts he came back and checked this one to find out whether it was gross, or not.

Mr. Erickson: Yes.

Judge Schwellenbach: What difference does it make what might lead him to come back. He might have come back because he was just walking by there. I don't think it makes any difference. If, as a result of later checking on the Brisky account he found it was a different sort of figures than what it showed at the time, I can't see any value in going into the transactions that occurred in the meantime that lead him to come back to this account, because they might have used different figures in every other account than the Brisky account. He can testify what he did the second time he went there and what he found out.

Q. State whether or not you had any conversation with either Mr. Barrett or Mr. Raines on the basis of the first figures you took down there.

A. Well, in all cases we asked for gross prices, prices received by the warehouse. [81]

Q. You asked for the gross prices.

A. Yes, before any deductions were made.

Q. Did you have any later conversation with Mr. Raines or Mr. Barrett about gross prices?

(Testimony of Henry Waller.)

A. Mr. Nessen and Mr. Phipps and I talked to him at different times on it.

Q. At a later time? A. Thats right.

Q. What was said at that time?

A. We went over about the same thing—we wanted gross prices and we didn't think we had them.

Q. What was said by those gentlemen?

A. Well, they said we did have the gross prices. The Pacific Warehouse bought the fruit and sold it to their other branches.

Q. Did you confront them with evidence on the Brisky account on the deductions they had shown there for storage?

A. I don't believe I did. I don't remember.

Q. Did you talk to them about the general method of them doing business? About making storage deductions in any way?

A. Well, I asked them continually if there were storage deductions made and their answer was 'no.'

Mr. Erickson: That's all.

Cross Examination

By Mr. Sanders:

Q. When you went in there the first time you say the Pacific gave you this document marked Exhibit 'D'. A. Yes sir.

Q. And you, yourself, made up one of your forms at [82] that time. A. Yes sir.

Q. And at that time you had plaintiff's exhibit 'D' before you. A. Yes.

(Testimony of Henry Waller.)

Q. You also had the Brisky ledger page that has been introduced here as plaintiff's exhibit 'A', did you not? A. I haven't seen Exhibit A.

Q. (Handing witness Exhibit 'A') You also had the different sheets showing the incoming of fruit from customers, did you not?

A. They were available—whether we checked them particularly in the Brisky case I would not be able to say.

Q. But they were available for you.

A. Yes.

Q. Where there was an eight cent storage charge you got that off the Brisky sales.

A. Not from the Pacific Warehouse. From Brisky himself.

Q. But so far as the Pacific Fruit and Produce Company, they didn't hold out any records?

A. No, they did not.

Q. The sales sheets were there available for you. You did check them in a good many of the accounts, didn't you?

A. I remember we did not check the sales sheets. I don't recall copies given to the customers were available on that. [83]

Q. Weren't the sales sheets there?

A. Not as I recall.

Q. They explained to you the method—what they gave to the grower when he brought in his fruit, didn't they?

A. Yes, the pack-out sheets.

(Testimony of Henry Waller.)

Q. Were those pack-out sheets there?

A. I believe they were.

Q. Did you check them?

A. In some cases we did.

Q. There was nothing to prevent you from checking them in every case if you felt you were justified, was there?

A. That would verify the total number of boxes accounted for.

Q. That 8c—you got that from Brisky, you say.

A. Yes.

Q. Now, some of these different accounts you mentioned—you also went to the different growers and checked the data you got from the Pacific of the different growers, too, did you?

A. In some cases we did. We do that on all warehouses.

Q. Then from all the information you gathered here, there and every place you made up your audit, did you not? Showing you defendant's identification '1' I will ask you whether or not that was prepared by you? A. It was.

Q. That was prepared from all this information you got from the various growers you have enumerated. [84]

A. No sir, this is a transcript of the memoranda I got from the Pacific Fruit.

Q. You didn't enter in there this other information you got from various other sources.

A. No sir, not on there.

(Testimony of Henry Waller.)

Q. And you didn't verify this?

A. No, not other than from the Pacific accountant to me.

Q. You didn't verify it from the different data that was there available.

A. Pardon me—I did verify it in so far as possible but the verification is not on here.

Q. You did verify it. A. Yes.

Q. This is a correct accounting according to all the available records of the Pacific Fruit.

A. Except in those cases where there was storage deducted we found.

Q. Why didn't you make some notation of that?

A. I left their accounting at the warehouse at the time I drew it up. You will notice this is a carbon copy.

Q. Did you on any subsequent period mail them any different accounting on account of the warehousing? A. I did not, no.

Q. Do you know of any other warehousing, or storage other than that one item of 8c for boxes that you have noted on there? [85]

A. No, I don't recall of any other items on there—that storage was definitely set out.

Q. In so far as you were able to ascertain that is the only instance in which they charged any storage to Mr. Brisky. A. So far as I know.

Q. You checked with Mr. Brisky and checked all the records available to you?

A. All we could find, yes. As I recall Mr. Brisky didn't have all of his records——

(Testimony of Henry Waller.)

Q. But the Pacific did have all of theirs.

A. Yes, thats right.

Judge Schwellenbach: When did you make out '1'—was that on your first visit in May?

A. I wouldn't say definitely the first visit—Mr. Nessen and Phipps and I visited the warehouse, then I went back myself later on and made a transcript of that accounting the Pacific gave me—not necessarily the first visit.

Judge Schwellenbach: The first visit as compared with later visits when you went back, you say, after you had checked other accounts.

A. Yes.

Mr. Sanders: Q. It was made before you checked with Mr. Brisky? They told you about the one cent storage charge that was added on there?

A. Storage charge?

Q. I mean the one cent advertising charge.

A. I don't believe its added in. [86]

Q. Didn't you testify these figures included in the first column included the one cent——

A. Those are not my figures.

Q. Didn't you testify the extension on the other side of the one cent were taken out—didn't you so testify that that was the situation?

Judge Schwellenbach: You have been asking him about defendant's '1'—anybody reading the record would think you were still talking about '1'—

Mr. Sanders: I beg your pardon—I mean in plaintiff's Exhibit 'D'.

(Testimony of Henry Waller.)

Q. They told you about the fact they had taken out the one cent advertising on there, did they not?

A. Thats right.

Q. I show you defendant's Exhibit '2' for identification, that was mailed out from your office carrying forward the results of your audit that is known as defendant's identification 1, is it not? Was not defendant's identification '1' included right with defendant's identification 2—weren't they mailed together?

A. It may have been. In some cases they are mailed together, and in some cases they are left at the warehouse at the time I was there. In this case it was possibly mailed with it.

Q. It was after you mailed out defendant's identification '2' that you went and checked with Mr. Brisky?

A. Yes.

Q. Why didn't you make your whole check at one time before you made up anything? [87]

A. We were checking quite a large number of warehouses and the fruit in most cases had all been sold, and also the question of getting in on the next year's loan—I wanted to get it cleaned up as soon as possible.

Q. You don't know when you checked with Mr. Brisky?

A. I don't know when exactly.

Mr. Sanders: I offer exhibits 1 and 2 in evidence.

Mr. Erickson: I will object to '2'—this is merely a statement Mr. Phipps set up based on the first

(Testimony of Henry Waller.)

audit—computation based on the first audit. We never did rely on this audit and its immaterial.

Objection overruled.

Defendant's identification '1' and 2 admitted.

Mr. Sanders: That's all.

Redirect Examination

By Mr. Erickson:

Q. Mr. Waller, after this computation was made by you up there you took the figures down to the Portland office did you not, Defendant's exhibit '1'—those figures, your original copy.

A. I don't remember whether I took them down or mailed them down.

Q. Then Defendant's Exhibit '2' is based on defendant's exhibit '1'. A. Yes sir.

Q. And state whether or not at that time you had any reason to suspect there was anything irregular about those prices.

A. At that particular time I don't believe I did. [88]

Q. And at a later time state whether or not you suspected there was anything wrong.

A. Yes, we did suspect it later.

Q. Was any new statement sent to the Pacific Fruit by yourself to your knowledge after that?

A. I don't recall. I didn't send it if one was sent.

Q. Now, about these storage charges, how did you first become aware of the storage charges on the Brisky account?

(Testimony of Henry Waller.)

A. Well, there were several things leading to it. Take the Chelan Valley Warehouse of the Pacific Fruit, and the accounting there rendered to the clients were in a little different form than the other warehouses, setting forth storage and deducting and checking back on some of the Cashmere growers we found a few instances where actual storage deductions were made. All of that lead us to believe there were some deductions in all cases.

Q. And after checking the Chelan warehouse of the Pacific Fruit Company was the first time you questioned the figures in the Brisky account, is that correct? A. Yes.

Q. What did you do as a result of that?

A. Contacted some of the growers from the other Pacific warehouses—tried to get what statements they had.

Q. Did you contact Mr. Brisky?

A. Yes sir.

Q. What information did you find from his figures? [89]

A. Well, in the case of one sale we found there were actual deductions of warehousing.

Q. Refreshing your recollection state whether or not there were one or two deductions in the Brisky account of storage?

A. Looking at this there are two deductions on two different days there—one on December 18, and one on January 8th.

Q. I believe from Exhibit '1' it is specified as 8c and the other is of no specific amount—

(Testimony of Henry Waller.)

A. That isn't stated on this—(witness refers to Plaintiff's Exhibit 'D').

Q. Looking on Plaintiff's Exhibit 'B', the deduction on 189 Delicious was of an unspecified amount, is that true? A. Yes.

Q. Did you make an effort to determine what that amount was?

A. I believe I did. Yes, I am quite sure I tried to verify that.

Q. What were the results of your investigation?

A. As I recall we found a storage of eight cents on that.

Q. On the Delicious?

A. Wait a minute—yes, I believe so.

Mr. Erickson: That is all. [90]

Recross Examination

By Mr. Sanders:

Q. At the time you were there at the Cashmere branch in the first group of examinations and made up Defendant's Exhibit '1'—you audited all of the accounts at that branch at that time, did you not?

A. Well, it wasn't an audit. I transcribed the information the Pacific gave me.

Q. But you did the whole thing at that time.

A. I believe I did.

Q. I think you said you had at that time plaintiff's Exhibit 'A' before you in doing that, that is correct is it not?

A. I believe I stated it was available.

(Testimony of Henry Waller.)

Q. Didn't you say there you used it in connection, and checked with it.

A. Not in all cases. We knew they were available.

Q. Is it your testimony that all you did was to go up there to the Pacific Fruit and Produce Company and copy down a copy of what is known as Plaintiff's Exhibit 'D', and walk out without checking any of the records that were there?

A. In some cases we checked the records, but ordinarily we didn't—we couldn't trace the fruit in any of the accounts beyond what is in here. You will notice the figures in here are substantially the same as the figures in here——

Judge Schwollenbach: When you say 'here'—that doesn't mean anything in the record—give the name or number of the exhibit you are referring to.

[91]

A. Plaintiff's exhibit 'A' are substantially the same as in Plaintiff's Exhibit 'B'.

Q. You didn't make any effort with all the record there before you to determine or ascertain whether the figures in plaintiff's exhibit 'D' they showed you was correct or not—you took it hook, line and sinker like it was.

A. In most cases—in some cases we checked it thru.

Q. Did you check on this Brisky account?

A. Whether we checked this particular one I don't know.

(Testimony of Henry Waller.)

Q. But the ledger page was put there before you, wasn't it? A. It was available.

Q. And the ledger page shows right on its very face doesn't it, that the Delicious was less storage? Doesn't show right on its very face—that ledger page? A. Yes.

Q. So that information was right there for you at the time you made your first audit, wasn't it?

A. It also lumps all the Delicious together whereas there were various grades and sizes.

Q. All the information was right there available for a complete break down as to all of them, wasn't it? A. Yes, I believe it was.

Q. And plaintiff's Exhibit 'A' itself showed right on its face there was a deduction of storage there, isn't that a fact?

A. Yes, it does show on here. [92]

Q. Judge Schwellenbach: You say these ledger sheets were available—isn't that the first sheet you would look at?

A. As I recall we had this group of cases to go into and on one or two occasions we checked thru and tried to find out what was available, but whether we checked clear thru on the Brisky case, or not, I don't know, but we did find the information was substantially correct taking from the ledger page, so we took the Pacific accounting, and in almost all cases in all accounts they so occurred.

Judge Schwellenbach: You mean after your first visit you had them get up Plaintiff's Exhibit

(Testimony of Henry Waller.)

‘D’ for you, and you then checked those with the ledger sheet?

A. In one or two cases we checked back with the ledger sheet, not in all cases.

Q. And how many of the twenty did you check?

A. Not over one or two, I don’t believe, all the way thru.

Mr. Erickson: I believe thats all.

(Witness excused.)

HOWARD A. NESSEN,

a witness called for and on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. State your name, please.

A. Howard A. Nessen. [93]

Q. And your business?

A. Working for the Farm Security Administration, Portland, Oregon.

Q. Were you so occupied in ’37 and ’38 fruit seasons? A. I was.

Q. What did your work consist of in 1937 and 1938?

A. During that time I was Regional Collection Advisor of the State of Idaho, Oregon and Washington. My job was to advise with the other boys of the Farm Security Administration in making

(Testimony of Howard A. Nessen.)

Collections on borrowers of the Farm Security Administration accounts.

Judge Schwellenbach: Where was your home?

A. Before I came on the Farm Security Administration I was located in Tacoma, Washington.

Q. What was your experience?

A. I spent about eleven years teaching agricultural and related systems in High School.

Q. You never had anything to do with collections, or anything of that kind?

A. Before taking this job with this Administration, no sir.

Judge Schwellenbach: I would like to ask the same questions of Mr. Waller. What was your prior experience, Mr. Waller, what business had you been in?

A. I worked for the Interior Department in Washington.

Q. How long? A. Three and a half years.

Q. What sort of work?

A. International accounting work.

Judge Schwellenbach: That is all. Proceed, Mr. Erickson. [94]

Mr. Erickson: I will offer Plaintiff's identification 'E', if your Honor please.

Mr. Sanders: No objection to the method of identification of it, but I think its immaterial.

Judge Schwellenbach: Subject to your general objection it may be admitted.

Mr. Erickson: This is a summary transcript of

(Testimony of Howard A. Nessen.)

account of George M. Briskey of the balance that was due and owing the Farm Security Administration from Brisky, Principal, \$726.11, and interest accrued to April 25th, 1942, \$107.46.

Q. Now, Mr. Nessen, what did your duties as collection advisor consist of?

A. I advised with the other employees of the Farm Security Administration whose duty it was to collect accounts of loans made by the Farm Security Administration. I had specific assignments such as obtaining of satisfactory accounting from the warehouses in Wenatchee and ascertaining the amount the Farm Security Administration should be able to obtain from fruit loans made during 1937 season.

Q. As such did you contact various warehouses and branches and so on in the Wenatchee district relative to the 1937 fruit crop? A. Yes.

Q. In particular did you contact the Pacific Company about the George Brisky account?

A. I asked them regarding all their accounts. I don't [95] know that I asked them specifically regarding the George Brisky account.

Q. You had a number of growers marketing fruit thru them?

A. Yes, as I recall we had twenty growers who marketed thru the Pacific.

Q. Can you state approximately the circumstances under which you contacted the Pacific Fruit Company the first time, and which members of the Pacific Fruit Company you interviewed?

(Testimony of Howard A. Nessen.)

A. Well, specifically, I went with the other boys to most of the warehouses when we first went out to obtain this information. If I may I would like to go back just a little bit to explain how we came about this deal——

Mr. Sanders: If the Court please, I submit we are interested in the Pacific Fruit and Brisky.

Judge Schwollenbach: I know altogether too much how this 'deal' started——

Mr. Sanders: What we are interested in is what he did with the Pacific Fruit.

Witness: What I meant is what type of explanation I made to these particular warehousemen, when we first went around to talk to them——

Q. You will have to confine it to this particular case, the Pacific Fruit Company.

A. We explained we were interested in ascertaining the amount due to the Farm Security Administration over and above the amount we agreed to subordinate on sales——

Judge Schwollenbach: Was this the visit in May that [96] Mr. Waller testified about?

A. I would say that is correct—May or June.

Q. Go on.

A. We asked them if they would co-operate to the extent of allowing us to check with them thru their books to determine the dates of specific sales and the gross price that was received from fruit of various varieties, grades and sizes and I think without exception that practically all of the warehousemen in the area——

(Testimony of Howard A. Nessen.)

Mr. Sanders: I submit he limit it to the Pacific.

A. I am sorry. The Pacific Fruit Company admitted us into their office—Mr. Barrett was there and Mr. Raines came in and the bookkeeper was present, and we discussed the general problem. We tried to understand their books to the best of our ability, and agreed that Mr. Waller should come back and try to obtain the exact dates, grades, sizes and so forth, the gross price of the fruit, and transfer them onto a form which Mr. Sussman of the Portland office and I prepared simply to record the information we were able to obtain from the warehouse.

Q. State whether or not you can remember any particular conversation in regard to the Brisky case.

A. Well, as I said, we were talking about all of the cases in general and at this time I wouldn't be able to state I could specifically specify any particular case of the group.

Q. State whether or not you made an effort to ascertain just how and when the Pacific Fruit purchased these apples, [97] or acquired these apples.

A. Yes, we did, and we tried to ascertain how they acquired it and its my recollection that the deal they had in accounting for that fruit was different than most of the other dealers and a little more difficult for us to try to figure out the information we were trying to obtain.

Q. State whether or not there was any contention made by the Pacific Fruit Company as to

(Testimony of Howard A. Nessen.)

whether or not they were buying the apples or taking them on consignment or handling them thru other methods, to your recollection?

A. Well, as I recall they stated they simply—their local houses simply handled the fruit for their retail stores scattered around the United States, and they admitted, though, that they did buy fruit from other than their so called own growers, that is, the people who usually dealt with them, I assume, and they occasionally sold fruit to others than their own retail stores.

Q. The people in that catalog weren't the regular customers of the Pacific Fruit—in other words the Farm Security went out and got this group of growers who couldn't secure funds from any place else. Mr. Brisky wasn't a regular customer—the Farm Security clients weren't regular customers of this Pacific warehouse?

A. In some cases they were.

Mr. Erickson: Q. Do you recall just what the specific contention of the Pacific warehouse was, if any, as to how they acquired this fruit from the Farm Security borrowers?

A. You say what their contentions were as to how they acquired it? [98]

Q. Yes.

Mr. Sanders: I think the question is objectionable. I think he ought to ask what they told him.

Mr. Erickson: That's the same thing.

Judge Schwellenbach: I think that's what he

(Testimony of Howard A. Nessen.)

means. (To witness) What did they tell you as to the way they got this fruit, whether they got it by purchase or on commission, or on consignment, or what?

A. I don't believe they stated whether they got it on commission or consignment. They stated the growers left the fruit there in their warehouse, and I know we had a conference—questioned them quite considerably about the storage. We couldn't understand how they kept the fruit in the warehouse without charging storage on it. As I recall the statements of Mr. Barrett, Mr. Raines and others, they didn't charge any storage and such, and we couldn't understand how they could leave the fruit in there, maybe for several months and still not charge anybody storage for it.

Mr. Erickson: Q. What did they say about that?

A. Well, they admitted there was a difference in price——

Mr. Sanders: I submit that he tell what was said.

Mr. Erickson: He is telling what they admitted.

Mr. Sanders: I think he should say what they said.

Judge Schwellenbach: You aren't going to let them admit it?

Mr. Sanders: I don't want him drawing conclusions as to what they said. When he says 'they admitted'—— [99]

(Testimony of Howard A. Nessen.)

Judge Swollenbach: Tell us what they said.

A. That's rather difficult to do after five years have passed. However, I would say they told us there was a so-called upage, or some other phraseology they used, which signified a difference in the amount they allowed the grower for the fruit on their books, and the amount for which the fruit was transferred to their own retail stores. We wondered whether that was an amount equivalent to storage, and I don't recall they ever told us that was an amount equivalent to storage. I believe they maintained it was not. It seems to me that the amount——

Mr. Sanders: Just a moment——

Judge Swollenbach: Objection sustained.

Q. You will just have to relate the conversation that took place there, what any one of your party said and what any one of them said.

A. Well, I said a moment ago I thought the amount which they called so-called 'upage' was equivalent to the cost of operating their warehouse on the basis of their statement that their warehouses were not supposed to operate at a loss, neither were they to operate at a profit.

Q. You are referring now, of course, to the later conversations, are you not, with the Pacific Fruit?

A. After we had been informed by Mr. Waller and Mr. Phipps' contact with the growers that they had accountings which showed a difference of anywhere from eight to eighteen cents a box.

(Testimony of Howard A. Nessen.)

Q. State whether or not Mr. Raines or Mr. Barrett [100] ever told you that the figures they quoted on their reports to you were the gross or the net figures. Did they make any statement to that effect?

A. I would say they never did make the statement that those were actually gross prices, that is under my understanding of what gross prices were.

Judge Schwellenbach: You mean by that your difference of opinion as to whether or not this ten cents charge was handling charge or storage?

A. My understanding is the gross price would be the price the grower should have received before any deductions were made, whereas they understood the gross price to be the price they showed on these sheets.

Mr. Erickson: I think thats all.

Cross Examination

By Mr. Sanders:

Q. I believe you said that you went into their office in May, 1938 along with Mr. Waller and Mr. Phipps and explained to the Pacific what you wanted.

A. Thats right.

Q. And they welcomed you at the front door and you went over the matter in a general way. Did they at that time disclose these books to you?

A. Yes, they had their books out on one of the tables there.

Q. Did you look at the books at all?

A. Yes, we looked at the books.

(Testimony of Howard A. Nessen.)

Q. Was one of the books there—was that plaintiff's Exhibit 'A' that is there?

A. I couldn't say as to that. [101]

Q. This was taken out of the general ledger, the customer's account—the general ledger customers account was there, was it not?

A. I don't know the books by name, sir.

Q. Didn't they have a book there just like, for instance 'B' showing the debits against him, what they charged his account with and credited his account with?

A. That would be the one contained the Brisky account? I wouldn't swear I saw any sheets dealing with the Brisky fruits at all.

Q. You wouldn't know a customers ledger page if you saw one there? The Pacific Fruit customers ledger page.

A. I don't know whether I would, or not. Ordinarily I would understand what a ledger sheet is if I saw one.

Q. Do you mean to tell this court when you were in there and they had these books there you didn't see the book—this plaintiff's Exhibit A was taken out of which purports to give all the charges against the grower and the credits to the grower?

A. Thats right. I don't know if I saw that book, or not.

Q. You don't know if you saw the book there which purported to have the accounts of the growers?

(Testimony of Howard A. Nessen.)

A. Of course I saw books having the purported growers' accounts.

Q. At the Pacific at that time?

A. Yes sir.

Q. If plaintiff's exhibit 'A' was taken out of such a book then you saw plaintiff's exhibit 'A'.

[102]

A. If it were taken out of one of the books lying on the desk at that time then I saw it.

Q. But you didn't pay any attention to it?

A. Not any particular attention.

Q. Did you pay any attention?

A. We used the books for discussion and Mr. Barrett had particularly pointed out to us some of the problems we were running into in trying to obtain our information from the Pacific Fruit which we had not been running into from some of the other warehouses.

Q. What you have reference to is the warehouses dealing or selling on a commission basis.

A. Not necessarily.

Q. Didn't the Pacific officers at that time tell you they were not in the commission business, but buying fruit outright?

A. They maintained that the majority of the borrowers fruit was lost——

Question Read: "Didn't the Pacific officers at that time tell you they were not in the commission business, but buying fruit outright?"

A. They bought some fruit outright and sold

(Testimony of Howard A. Nessen.)

some fruit to others than their own houses—therefore I understood that they did both.

Q. Did both what?

A. Both types of sales.

Q. Now, we are talking about buying—didn't they tell you that all the fruit they handled they bought themselves and paid the growers for it or credited [103] his account with it?

A. I don't know whether they made that statement or not.

Q. Was there anything in any of their books to show any commission transactions?

A. I don't know. I didn't make that close an examination of their books.

Q. Then you wont say they told you they were buying for their own account the fruit they handled? A. I said they stated they did both.

Q. Both what?

A. Bought fruit for their own retail stores and also bought fruit to sell to others than their own retail stores.

Q. But the fruit they handled they bought. You know the difference between buying on your own account and handling on a commission basis?

A. Yes, I think I do.

Q. Which were they doing, buying on their own account or handling on a commission basis, or do you know?

Mr. Erickson: He has already answered that.

(Testimony of Howard A. Nessen.)

Mr. Sanders: I submit I don't know—

(Question read.)

A. I certainly do not know the internal operations of the Pacific Fruit and Produce Company.

Mr. Sanders: I submit he can answer without a speech. All he can say he doesn't know whether they were buying on their own account or handling on a commission basis.

Witness: My recollection is they were doing both.

Q. Its your testimony they told you they were doing both? [104]

Judge Schwellenbach: You mean by that buying outright and also selling on a commission?

A. Its my recollection that they bought the fruit for their retail stores but that that practice didn't preclude them from operating as other warehouses in the Wenatchee area were operating, that is, taking in one of their own growers fruit, putting it in their warehouse and leaving it there, and as he ordered them to sell it, they sold it.

Q. (Sanders): Did you at any time examine any of the accounts of the Pacific Fruit?

A. Individual grower's account?

Q. Yes.

A. I wouldn't say I did a complete examination. We glanced over the books and discussed some of the problems.

Q. Did you see in there any place a charge

(Testimony of Howard A. Nessen.)

against any grower for commissions on the sale of fruit?

A. On the books which we looked at?

Q. Yes. A. I don't recall we did.

Q. Now you said that this information was much more difficult to get, information from the Pacific Fruit than it was from other sources—why was it more difficult?

A. It was more difficult to get the information we asked for. Most of the warehouses which we visited had books which showed the amount of apples which the grower grew during the season, and brought into their warehouse in loose boxes. Then we had reference to the manifest or pack-out statement showing the percentage of loose boxes which were packed for sale. On the basis of individual sales we were able to trace from that over to [105] another ledger account the exact price which those apples brought. In other words, have the car number in one ledger which referred to another ledger and in that way could easily compute the price per box that was paid for this particular grower's fruit, whereas in the Pacific Fruit and Produce office which I visited we were unable to follow thru as was done in the other warehouses, and thats how our discussion with Mr. Barrett and his staff started as to how to get information from his records.

Q. Didn't they have in their office there avail-

(Testimony of Howard A. Nessen.)

able to you the amount of apples that came in from the farmers?

A. I assume they did. I think they did.

Q. In that regard their record was no different, was it, than any other dealer?

A. I presume up to that point there was no difference.

Q. They had the same pack-out record, didn't they?

A. I don't know—I assume they did.

Q. You didn't show enough concern to find out if they did, is that it?

A. It wasn't our business to find out whether they did, or not.

Q. You were telling how much difficulty you were having with the Pacific Fruit—they didn't have the same records—now, showing you plaintiff's Exhibit 'A' I ask you whether or not that doesn't have right down on it—415 boxes of Jons, 207—isn't it right down there on the ledger page?

A. You mean in this particular account?

Q. Yes—isn't what the farmer got shown right there?

A. Well, here it shows 40 boxes of Jons, \$15.60—shows [106] a credit.

Q. It shows right down there plain—anybody could read it—isn't that a fact?

A. I was talking about gross prices. This refers to a credit.

Q. That's what they paid the farmer for it,

(Testimony of Howard A. Nessen.)

isn't it. They bought that fruit from the farmer, didn't they?

A. I don't know they bought it—I assume it was delivered to them by the farmer.

Q. Doesn't that show they paid the farmer that much money for it?

A. It shows they entered it on their ledger here as a credit.

Q. That doesn't indicate anything than they bought that fruit of the farmer.

A. I don't think that would necessarily constitute a sale or a purchase.

Q. But at least those records show that those apples came in and the farmer got credit for them, doesn't it—and perfectly plain there where anybody could read it.

A. They entered a credit on this particular sheet for that particular grower.

Q. There's nothing difficult in that is there?

A. That is comparatively simple.

Q. Every other item on there is just as simple, isn't it?

A. I haven't examined all the items on here.

Q. Find me a complicated one.

A. I don't see any complicated items on there.

[107]

Q. I see. I didn't think you would.

A. I had no reason to look for any.

Mr. Sanders: That's all.

(Testimony of Howard A. Nessen.)

Redirect Examination

By Mr. Erickson:

Q. State whether or not the difficulty you had was determining the net prices and the gross prices.

A. Thats right.

Q. You didn't have any difficulty understanding the figures they gave you——

A. That is, understanding the sheet such as this sheet for instance?

Q. Yes.

A. No, we would have no difficulty understanding their entries.

Mr. Erickson: That is all.

(Witness excused.)

B. R. PHIPPS,

a witness called for and on behalf of the plaintiff,
having been duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. State your name please.

A. B. R. Phipps.

Q. What is your business?

A. Farm Security Administration District supervisor.

Q. What district are you supervisor of now?

A. Distrcit No. 3 in Washington.

Q. That includes all of Washington?

(Testimony of B. R. Phipps.)

A. Includes six counties, Chelan, Douglas, Grant
[108] Kittitas, Yakima—

Q. During 1937 and '8 what was your business then?

A. County supervisor in Wenatchee in Farm Security.

Q. You had charge of the Wenatchee District?

A. Yes.

Q. What was your experience before you accepted a position with the Farm Security Administration?

A. I was born in Wenatchee there and have grown up on a fruit farm.

Q. Directing your attention to the 1937 fruit crop around Wenatchee did you contact the Pacific Fruit Company with reference to their disposition of the 1937 fruit crop—of some of your clients in the Wenatchee district?

A. I was in company with Mr. Waller and Mr. Nessen at the time the situation was generally discussed with Mr. Barrett and Mr. Raines.

Q. State in your own words what was said in that discussion, Mr. Phipps.

A. Well, I can't give you any details of the discussion other than the fact that during the conversation it was brought up their fruit dealings were different than some of the other warehouses—they did sell to their own branches, their own units.

Q. Do you recall any conversation with the Pacific Fruit people as to the George Brisky account?

(Testimony of B. R. Phipps.)

A. At the time I made my contact with them we were just starting into the record, the procedure of trying to get an accounting and there were no comments at all in relation to any particular borrower or borrowers. [109]

Q. Was there any conversation between the people at the meeting as to whether or not the Pacific Fruit Company purchased that fruit or handled it on a consignment basis, or what was said along those lines?

A. Well, it was my understanding the company did buy the fruit—that is, they had it in storage—they bought it—that was my understanding of it.

Q. What was said about that if you recall?

A. You mean with regard to how they purchased it?

Q. Yes.

A. Well, there was no difference as I understand it—they made the purchase from the grower—in other words they purchased the fruit—is that what you had reference to?

Q. Was anything said about the times with which, or, rather at which they purchased the fruit?

A. I don't recall.

Q. Maybe I don't express myself clearly. Was there anything said about the consent or non-consent of the grower about sales, and if so, what was said?

Mr. Sanders: If your Honor please: just a moment now. This witness has already testified

(Testimony of B. R. Phipps.)

it was said the Pacific bought the fruit from the farmer. Its perfectly obvious having bought the fruit from the farmer there would be no occasion to turn around and ask the farmer if they could sell something they had bought.

Objection overruled.

Q. Was anything said by any officer of the Pacific Fruit Company about their methods of purchasing from the grower, and if so, what was said?

[110]

A. You mean as to how they purchased the fruit?

Q. Yes, with respect to the time.

A. I don't recall.

Q. State whether or not there was anything said there with reference to the prices shown by the Pacific Fruit on their ledger being gross prices or net prices?

A. Well, they didn't at any time indicate gross or net price. At least, I don't recall the discussion coming up at that point whether it was gross or net price as they indicated on the accounts at the time they were given.

Q. Well, after that conference at the Pacific Fruit Company at the time all of them—all of you were there, you were shown the figures then and Mr. Nessen had prepared defendant's Exhibit '1', a carbon copy of those things, did he not—or Mr. Waller—pardon me.

A. May I have your question again, please?

(Testimony of B. R. Phipps.)

Q. At the time Mr. Waller was there, I mean after you were there Mr. Waller prepared that defendant's Exhibit '1', did he not?

A. That's right.

Q. That was taken from what?

Mr. Sanders: Just a moment: was he present at the time?

Mr. Erickson: He knew what it was being taken from. I understand he was there before it was taken down.

Mr. Sanders: Was he there when it was prepared?

Judge Schwellenbach: Mr. Waller testified he thought he came back a second time and got the figures on this exhibit.

Witness: It was the understanding it was to be taken from the gross sales, if that is what you mean— [111] gross sales information that was the understanding.

Q. Then after Mr. Waller took down those figures at a later date did you get to see them?

A. Yes, I saw them.

Q. Did you inspect those figures at a later date?

A. Yes, in the office.

Q. And after inspecting those figures what did you do then? Did you make any further checks?

A. I made further checks on some of the borrowers' records of their own that was brought to my attention.

Q. What was the purpose of making further checks?

(Testimony of B. R. Phipps.)

A. To make sure we were getting the gross sale price.

Q. To make sure the price the Pacific Fruit quoted was the gross price instead of the net price?

A. Thats right.

Q. What success did you have?

A. We found some accounting that didn't indicate that was always the case.

Q. Did you make any check with reference to the Brisky transaction?

A. I don't remember that case particularly. I do remember other cases I can recall.

Q. Well, at a later date did you make any check on the Brisky transaction? A. Yes.

Q. What did you discover then?

A. I discovered that the accounting showed there was some storage involved in the Brisky accounting, and that also the exhibit shown here—I don't recall [112] the number, 'D', I believe—which we had used as a basis—

Mr. Sanders: Just a moment: unless the witness was there at the time that was prepared I object to him testifying what was the basis—my understanding is he wasn't even present—

Q. Were you present when defendant's exhibit '1' was made? A. No.

Mr. Sanders: I object to any testimony as to what was used to make defendant's exhibit 1—he testified he wasn't even present.

Objection sustained.

(Testimony of B. R. Phipps.)

Q. After you received defendant's exhibit 1 just how did you verify the check?

A. The only thing we had as far as I was concerned—I wasn't particularly qualified along accounting lines—that wasn't my particular phase—the only thing I could verify was that the accounting which had been rendered Mr. Brisky didn't check with the accounting which is given here.

Q. Explain the discrepancy.

A. The fact there were no Delicious entered on the exhibit which came into my hands, and which later was shown in Mr. Brisky's accounting—also the fact the 189 Delicious showed advertising and storage deducted. There were also storage deductions in the case of Jonathan sales.

Q. State whether or not—Mr. Phipps in connection with your work for the apple season of 1937, state whether or not you were acquainted with the market [113] prices in fruit—apples—the buying and selling price—the market price in Wenatchee.

Mr. Sanders: If your Honor please, I must object to that.

Judge Schwollenbach: He can answer that by 'yes' or 'no'.

A. Yes.

The Court: Now do you wish to examine him on his voir dire qualifications as to that question?

Mr. Sanders: Yes, I would like to examine him on it.

(Testimony of B. R. Phipps.)

Voir Dire Examination

By Mr. Sanders:

Q. What experience did you have in 1937 in buying and selling fruit?

A. Not buying and selling—I do not qualify on that basis—simply a matter of keeping in touch with the market and knowing what the markets were.

Q. You merely checked the reports of sales reported in from various accounts.

A. Reporting systems, yes.

Q. And your sole source—or knowledge of the market prices is based entirely on information you gathered——

A. No—

Q. What other source?

A. Keeping in contact with warehouses themselves—I had to know what was going on so far as sales were concerned.

Q. You knew the prices the warehouses were buying for their own account—you knew the prices they were [114] paying the grower.

A. Yes.

Q. You knew then the prices the Pacific were paying to the growers of fruit they were buying.

A. On the fruit I saw on that particular account at the time I contacted them on it.

Q. That was from time to time as the season went along, or at the close of the season?

A. No, from time to time.

Q. From time to time thruout the season you knew the price the Pacific was paying Brisky for fruit to them.

(Testimony of B. R. Phipps.)

A. No, I don't recall whether I ever checked on any particular account—I have no recollection of going down and saying 'let me see Mr. Brisky's account' on a particular day.

Q. Were you checking what the Pacific was paying to growers on fruit the Government had a loan on from time to time?

A. That was my business being acquainted with the market sufficiently so as to advise growers that contacted me from time to time.

Q. Did you know from time to time what the Pacific was paying to the growers which you had loans on their fruit?

A. I was acquainted with what they were paying as a rule. The average sale, enough so I knew pretty much the basis, at least.

Q. Did you during the course of that time or season advise the Pacific they were buying their fruit below the [115] market where the Government had a loan?

Judge Schwellenbach: That might be cross examination but its not voir dire.

Mr. Sanders: I will reserve it for cross examination your Honor.

Q. Now does the question of the ripeness of the fruit change the value of the fruit?

A. You mean the maturity of the fruit?

Q. Yes.

A. Yes, that is if its almost at the point of decay.

(Testimony of B. R. Phipps.)

Q. And the ripeness short of decay does not affect it?

A. It might affect the price that fruit would bring.

Q. Isn't it a fact that during the season the same class of fruit is selling at different prices on the same day, the same fruit?

A. You mean with regard to sizes?

Q. No, the same size, the same grade, isn't there a great variation, as high as twenty five cents?

A. Either way, up or down?

Q. Either way, up or down.

Judge Schwellenbach: You mean on the same day there would be a difference of twenty five cents?

Mr. Sanders: Any way from the figure of twenty five cents.

Witness: I don't think it would vary that much.

Q. How much would it vary?

A. It might vary ten or fifteen cents—

Q. Ten to fifteen cents a box on the same day, the same fruit. [116]

A. Its possible. Depends on where its being sold.

The Court: How many loans did you have there that year? A. Approximately 379.

Q. And how much did they amount to?

A. In the neighborhood of \$400,000.

Q. Your job was to service those loans?

A. Thats right.

The Court: Overrule the objection on the question of qualification.

(Testimony of B. R. Phipps.)

Mr. Erickson: I understand no further questions are necessary to qualify the witness.

Judge Schwellenbach: I have overruled the objection to that question.

Q. (By Mr. Erickson): Mr. Phipps, were you acquainted from day to day with the market price of fruit in Wenatchee and community based on size, quality and grade during the 1937 season, fruit season?

A. I had to keep in touch with the markets from time to time, day to day. We had market information available to our office.

Q. You were acquainted with the market prices?

A. Yes.

Q. I call your attention to October 27, 1937, the ten boxes of Jonathan apples, graded F & F, size all, can you state what the market price would be at that particular time in Wenatchee?

Mr. Sanders: Now, if your Honor please. There is just absolutely no basis for any such question as that. [117] The defendant in this case is charged with the conversion of certain apples. Now, I gather from Counsel's statement there to the effect it is his contention the Pacific converted this fruit at the time they sold it to some other customer—as a matter of fact if we converted it it would have to be at a time——

The Court: What difference would it make—if I go out and buy an automobile with a mortgage on it, and I pay for it—I buy it subject to the

(Testimony of B. R. Phipps.)

mortgage and if I put it away in such a way the mortgagee can't get it, then I have converted it, haven't I?

Mr. Sanders: But there is no evidence before this Court we did that on October 27th with that fruit. So far as the evidence before this court is concerned that fruit was right there in our warehouse—

The Court: What is that date?

Mr. Sanders: That is the date we bought the fruit from the farmer. Its not the date we shipped it. The evidence shows it is not the date we shipped it.

The Court: Is that correct?

Mr. Erickson: Its our contention the fruit was sold on that day.

Mr. Sanders: Sold to the Pacific by the farmer.

Mr. Erickson: Sold from one branch of the Pacific to another branch.

Mr. Sanders: No. Mr. Raines testified that was the date he bought the fruit from the farmer, and it was shipped out at a later date. There is not a syntilla of evidence as to the date that fruit was shipped out— [118]

The Court: My present impression is this—I may be wrong—for the purpose of this line of testimony I am not going to consider the subordination agreement. We are trying to arrive at the amount, if there was a conversion. The Pacific bought the fruit from the grower subject to the

(Testimony of B. R. Phipps.)

mortgage. Now, if the Pacific had gone out like the rest of the dealers did and sold it on the market and the record shows the date they sold it and shows no extension of the amount on the amount due on the mortgage then that is the date on which they converted the fruit and you would be entitled to prove how much they got for it. Now, it seems to me the testimony now shows because of the fact instead of selling it they shipped it to various places around the country, mixing it in with a lot of other fruit, if they destroyed the possibility of knowing what the selling price of that fruit was by shipping it away, making it impossible to trace it, my present attitude is to let you prove what the market price was at the date they shipped to various branches in the United States. It seems to me clear you can't prove the date on which they bought the fruit from the farmer—I am not going to say now that that constitutes the conversion—or that is the measure of damages owing you, but separating this section of the case I will permit you now to prove the market value on the day they shipped it to the various branches. They bought it from the grower subject to your mortgage, and they did not convert it on that date. When they made it impossible for you to ascertain how much they got for it [119] that I would consider is the date of conversion. I will sustain the objection to the question, if that is the date they bought it from the grower.

(Testimony of B. R. Phipps.)

Mr. Erickson: A subpoena duces tecum has been served on the Pacific to show the date they shipped and sold these apples, and I understand they are here now and say they can't show that.

Mr. Sanders: We have records when we shipped a great deal of it—we have a whole apple box of records showing the shipment of fruit, but I can't show how much we actually got for the fruit at this time—we shipped some 600 boxes of apples out of here and they are there—I also wish to object to this on the further ground the evidence shows that the subordination agreement provides for the sale from the 'mortgagor——

The Court: We will argue about that later. At present I wish to separate this section of the case and see if they can prove what amount of damages were sustained by sending the fruit away from Chelan county.

Mr. Erickson: I would like to call some witness from the Pacific Fruit to show when they did ship this fruit.

Mr. Sanders: Here are the specific documents——

Judge Schwellenbach: I thought I told you gentlemen to do that on your own time at the noon hour.

Mr. Sanders: There are some six hundred cars there, and according to counsel we converted this fruit at varying periods of time. Its the Government's case to prove when we converted it— [120]

(Testimony of B. R. Phipps.)

Mr. Erickson: I would like the privilege of excusing Mr. Phipps temporarily and calling either Mr. Barrett or Mr. Raines and finding out when this fruit was shipped out of the state.

The Court: I think Mr. Barrett is the man who was there at the time. Why don't you call him?

Whereupon Mr. Phipps was excused temporarily and

O. R. BARRETT,

a witness called by the plaintiff, having been duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Your name is O. R. Barrett?

A. Yes.

Q. And you are chief accountant for the Pacific Fruit and Produce Company?

A. One of the chief accountants.

Q. Where is your office? A. Seattle.

Q. You have the records of the shipments of the George M. Brisky and Evelyn Brisky fruit of the 1937 crop from Cashmere?

A. Mr. Sanders segregated a good portion of the records Sunday, and they are on the table there.

Q. Will those records disclose the shipment of this fruit out of Cashmere to certain parts of the United States and other parts of the United States?

(Testimony of O. R. Barrett.)

A. It does disclose it in a good many cases, and in a good many cases it doesn't. [121]

Q. Will you get those records?

Mr. Sanders: I think if your Honor will rule on the question as to whether or not the transaction means that its a sale by the mortgagor as called for in the subordination agreement——

The Court: I will rule against you on that——

Mr. Sanders: The subordination agreement does specify sales by the mortgagor. The Government's auditors here have testified the Pacific bought that fruit from the mortgagor—there is absolutely no charge——

The Court: Subject to the mortgage which is of record and of which you had knowledge.

Mr. Sanders: And on the basis where we were entitled to deduct sixty cents from the price to the mortgagor. Now there is absolutely no evidence in this case, not even a hint of collusion—no allegation in the complaint of collusion between us and the mortgagor. There are books there showing what fruit was sold by the mortgagor. Under the terms of that agreement we didn't agree to account to the Government for the difference between the market value of the fruit, only to account on the basis of what the mortgagor sold the fruit for.

The Court: Objection overruled.

Mr. Sanders: Allow us an exception.

The Court: Exception allowed.

(Testimony of O. R. Barrett.)

Q. Do you have the records there of the Brisky Fruit that was sold and shipped by the Pacific?

A. There is one file for thirty boxes of fruit in January. [122]

Q. What kind of fruit was that?

A. Fancy Saps.

Q. On what day?

A. The car was shipped January 22d.

Q. 1938? A. Thats right.

Q. Where was it shipped to?

A. That car was shipped to C. M. Kopp for export thru Tacoma.

Q. Does your record disclose the price?

A. Yes.

Q. What was the price?

A. The car was sold for forty five cents.

The Court: That was sold to an exporter?

A. Yes—he was exporting that particular car.

Q. What did the car consist of—all fancy Wine-saps?

A. A straight car of Fancy Winesaps.

Q. Do your records there disclose the sale of any other Brisky fruit?

A. It would disclose it if it was moved out in a reasonable length of time after it was harvested before they began consolidating the fruit in the various storage rooms. After, I would say possibly, the first of December it would largely lose its identity, then we would regard it as Pacific house stock.

(Testimony of O. R. Barrett.)

Q. Do you have the shipping records there of any other of the Brisky fruit except that thirty tons?

A. Yes, there are quite a few there. Mr. Raines is picking out some now where we can identify them—— [123]

Q. When was this fruit commingled?

A. After we buy the various lots of fruit when our inventory is running low we keep what we call a working margin of the fruit on hand from which to fill orders and have the fruit in our possession and belonging to us, and as it is sold out and stock of certain varieties and grades is lowered we will buy from various growers who wish to sell on that particular day. We also buy to fill in orders of which we are short—the rest of the fruit is placed in storage as our own. It might be shipped next week and it might not be shipped for sixty days.

Q. Well, you don't know now just when Mr. Brisky's fruit was shipped beyond the thirty boxes.

A. Its impossible to tell when the other shipments were made. A large portion of it, I would say more than half, may not have been shipped out until after the first of the year. The only way to get clear as to the identity of that fruit we do have a manifest of the car loading of them in a large number of instances which show the code number of the box.

Q. Did you treat all the Brisky fruit as your own after the 15th of December?

(Testimony of O. R. Barrett.)

A. Depends on when it was purchased, and if we purchased it we regard it as our own, even though there is a part of it not shipped out on the day it was purchased. We can't buy in little parcels. Even though we need only ten boxes to fill a car the manager would buy possibly a hundred boxes.

Q. When did you claim title to this Brisky fruit? [124]

A. When it was entered on the ledger.

Q. The dates that are marked here on the exhibit?

A. Yes.

Q. It was commingled before that time, though.

A. No.

Q. You don't know exactly when it was commingled with other fruit, do you?

A. No, it depends on when we began assembling it in certain lots. We might have a half a dozen lots purchased and move them all into that room, then the identity is largely lost. We can trace it in some cases—in most cases you can't.

Mr. Sanders: Before you get thru I want to cross examine this witness a little bit.

Mr. Erickson: I submit the testimony is most unsatisfactory. He has accounted for only thirty boxes——

The Court: You went out and purchased apples from Mr. Brisky—now how soon after you got his apples in there did you commingle them with other apples so as to make it impossible to trace it?

A. That would depend largely on what the mar-

(Testimony of O. R. Barrett.)

ket situation was at that time. If it was strong and considered it was going higher we would carry a large inventory, probably thirty or forty thousand dollars worth of fruit purchased at harvest time. If we thought it was going to be weak we probably wouldn't want more than a small working margin of three or four or five thousand dollars—

The Court: How soon after you purchased—you purchased [125] a certain number of boxes of Winesaps out of which you sold thirty in one shipment to this exporter over at Tacoma, the rest of it probably went into your warehouse and was intermixed. Now, how soon after you made any particular purchase from Mr. Brisky was this other fruit that wasn't immediately shipped out of your warehouse put into your warehouse?

A. Well, it would be in the warehouse to start with.

The Court: I mean intermingled.

A. At packing time it would be placed away very quickly to make space—later on it might not.

The Court: Look at your ledger sheet—that shows your purchases from Mr. Brisky.

A. Yes, these purchases run thru from September to February 28th.

Mr. Sanders: May I ask the witness a couple of questions?

Q. Each grower that you buy from has a separate marketing number, does he not?

(Testimony of O. R. Barrett.)

A. Yes.

Q. So as long as any of that fruit is in the warehouse it can be segregated according to the marking on the boxes. A. Yes.

Q. The only thing when you ship out fruit you consider you have bought you do not on your manifest show the particular growers name.

A. Ordinarily no. That would depend largely on the care of the loader. Some car loaders put a lot of detail on their manifest, and others don't even segregate any of it. [126]

Q. However, as long as this fruit is in your warehouse it can be segregated.

A. As long as the box is in existence.

Q. If you found that box in New York or any place else you could from the marking on it tell the source of that box?

A. Thats right—from the code number on the box.

Mr. Sanders: I submit its not up to the defendant——

Judge Schwellenbach: I can't believe a person has a right to take mortgaged fruit, and purchased it with knowledge of its mortgage, as you did and then put it out of your own control in such a way you can't tell anybody who came there what became of it—when it was sold, how much it was sold for, and avoid the responsibility to the mortgagee.

Mr. Sanders: We can tell to a large extent by going thru these car records. The Government

(Testimony of O. R. Barrett.)

served on us Saturday evening a subpoena to have these records here for early Tuesday morning.

Mr. Erickson: I told you in Wenatchee two weeks ago——

Mr. Sanders: Its perfectly obvious it would be a physical impossibility where we have moved out some six hundred cars out of this one place for us to go thru the files of some six hundred cars and pick them out. Now the Government is trying to throw upon us the burden of assembling their evidence for them, that in the face of the fact that under the very terms of the contract we bought this fruit under specified that all we were required to do was to account for the sales made by the mortgagor, and not the sales by us. [127]

The Court: I don't have such a contract in evidence.

Mr. Sanders: Your Honor can understand why we couldn't have these records segregated to the "nth" degree, but this evidence to a large extent is available to the Government if the Government wishes to take and go thru these six hundred envelopes. But the Government says 'the burden is on you to go thru and pick out our evidence for us'. I submit its not fair. We thought the price and everything was agreed upon. The Government had plenty of men up there. Three different men—they took the witness stand and testified as to going over our records. We thought it was a closed incident as to what the prices were.

(Testimony of O. R. Barrett.)

The Court: We will adjourn to 9 o'clock tomorrow morning. I don't know now whether I will hold the Government or the defendant responsible for holding up the case, but you'd better work all night on it. I don't know which I am going to hold responsible for it. I don't see how you can operate a business, take property knowing there is a mortgage on it, and then operate your business so as to make it impossible for them or any one else to know what became of the mortgaged property. On the other hand I feel it is the responsibility on the part of the Farm Security Administration who went in there in May, 1938, to have done more than they did. I don't know how I am going to hold in the morning whose responsibility it is.

Whereupon Court adjourned to convene at 9 o'clock A. M. April 29, at which time, all parties present the trial proceeded. [128]

WITNESS O. R. BARRETT

resumes the stand for further direct examination.

By Mr. Erickson:

Q. Have you made further examination of the records with reference to the sale by the Pacific Fruit Company of apples raised upon the Brisky farm?

A. I did last night of all the records we have here.

Q. Will you give us a statement as to what you discovered last night in detail there.

A. Among the records we have here which is a

(Testimony of O. R. Barrett.)

fourth, or possibly twenty percent of the files from this pile we have something like seventeen cars I discovered last night. I understand from Mr. Nessen he discovered a couple more.

Q. Will you state the shipments you found last night, when the shipments were made.

A. Yes, I made a summary here of those—the first car is file 309, car 33729, shipped February 1, 1937.

Q. It would be 1938, wouldn't it.

A. I beg your pardon, '38 is correct. That particular car contained out of the 756 boxes, 48 extra fancy Delicious—150s, and generally we can identify it as being Mr. Brisky's fruit, the fruit bought from Mr. Brisky, I believe on January 8. I didn't have the ledger sheets which I think are in evidence now, or anything else that I could definitely identify them.

Q. That is, 48 boxes of Brisky fruit is all that was in that car.

A. All that was in that particular car—there were other growers fruit in the car, fruit bought from other growers. [129]

Q. And that fruit was shipped by the Pacific Fruit. A. That's right.

Q. And where was it shipped to?

A. I don't have that information here—its file 309—you have all the files there—I see it was shipped to D. L. Scotto & Co., New York City.

Q. Did the car entirely consist of extra fancy delicious?

(Testimony of O. R. Barrett.)

A. A straight car of Extra Fancy Delicious in sizes ranging from fifty six to a hundred and fifty.

Q. What was the purchase price per box?

A. Our purchase price?

Q. Yes—I mean the selling price you sold them for to Scotto and Company.

A. The car sold for 82½¢ less the brokerage.

Q. Per box? A. Per box.

Q. Now, do you have a record there of any other shipment of the Brisky fruit?

Q. (By Mr. Sanders) What were the sizes the Brisky fruit was in?

A. He had a fair range of sizes, the largest 88 and the smallest 150, which was about representative of the whole car.

Mr. Erickson: I think thats about all the information we want of that shipment.

Mr. Sanders: Just one more question—showing you plaintiff's exhibit 'd' can you identify those apples on plaintiff's Exhibit 'D'?

A. I think I can. There was a discrepancy between Jons and Delicious as has been disclosed before—I think the [130] only fruit we bought of Delicious that could possibly appear on there was either December 18 or January 8.

Q. Can you tell from Plaintiff's Exhibit 'D' what credit we gave Mr. Barrett for that fruit?

A. I think 97c.

Q. We sold for eighty two and a half.

(Testimony of O. R. Barrett.)

A. Thats correct.

Mr. Sanders: That's all.

Q. (Mr. Erickson) You aren't absolutely sure about that?

A. I can check very quickly—I don't think we bought any other delicious except that particular lot, so it would have to be—there was a confusion between Jons and Delicious——

Mr. Sanders: This will give it to you.

(Handing witness Plaintiff's Exhibit 'A'.)

A. January 8, 189 boxes of Delicious were purchased—I think thats the only purchase of Delicious we made from Mr. *Barrett*.

The Court: These forty eight boxes were out of that 189? A. It must have been.

Q. Now, about your next shipment of Brisky fruit.

A. File 329—car shipped on February 10, 1938, F.G.E. 52779—that car was a car of—half Wine-saps, and half Delicious—the car contained of the Brisky fruit, 26 boxes of Fancy Delicious, ranging in sizes from 125 to 150—the car was sold at the price of 75c on the Delicious less \$30.00 brokerage.

Q. To whom was that car sold? [131]

A. The invoice and the confirmation of sale indicates it was shipped to Jobbers Produce Company at Jackson, Mississippi.

The Court: I think you said \$30 the brokerage on his boxes would be—I didn't get it on file 309.

A. The approximate rate is almost uniformly

(Testimony of O. R. Barrett.)

\$30—this car was \$25 brokerage carried on different distances.

Q. That would be about three cents a box.

A. A little better than three cents a box.

Q. (By Mr. Sanders) Do you know how much we paid the grower for those apples?

The Court: They must have been the same apples out of the 189 Delicious.

Mr. Sanders: These were Fancys—were these the same price, 97c?

Witness: No, these were Fancys, the first car was Extra Fancy—77c for these.

Mr. Erickson: Per box, instead of 75c.

Mr. Sanders: We paid the grower 75c—75c is what we sold them for—less three cents brokerage.

Witness: I am sorry—its more than that. Its pretty hard to tell but I think we paid the grower—a flat price on 163s, and the regular 97c on the extra Fancys—and 77c on the Fancys.

The Court: You said 97 on the Extras and 77c on the Fancy?

A. On a range of sizes—that would include large and small ones, both.

The Court: You think you paid 97c for them. [132]

A. The fruit that went into this car would be the largest of the 77c fruit, I think, and would be more desirable and should get a better price—

The Court: When you bought them you actually paid 77c the closest you can come to it.

(Testimony of O. R. Barrett.)

A. Thats the closest I could come.

Mr. Erickson: Q. Referring to defendant's '1'—these are all listed as Jons but are really the Delicious sold on January 8th, aren't they—isn't it a matter of fact the Fancys were only credited 67c?

A. Yes, those—this shows 67c on 163—

Q. Its 67 instead of 77, isn't it?

A. On this sheet it is, yes. This is your audit.

Q. And taken from your books, though. That 77 was Extra Fancys.

A. On the small sizes that's probably true.

Q. So you really allowed the grower 67c instead of 77c. A. I think that is correct.

Q. Now do you have another shipment there that you can trace to Brisky fruit?

A. Yes—there is in file 370—FGE 19428, a car was shipped on March 2, 1938, presumably part of that January 8th—we sold to Atlantic Commission Company—Wenatchee—that car sold at 90c for—that was Extra Fancy—flat rate on all sizes—Mr. Brisky's fruit in that car was all 163s—just the one size—Delicious—

Mr. Sanders: What price did we pay Brisky for the 163 Extra Fancys? [133]

Mr. Erickson: How many boxes, first?

A. Six boxes in that car. The price on the extra Fancy—163s—97c.

Q. What was the brokerage price per box?

A. Three cents—no, pardon me—the Atlantic

(Testimony of O. R. Barrett.)

Commission Company I think was a cash price—no brokerage.

Q. Will you give us the next sale, then.

A. You have 309—312——

Q. We haven't 312——

A. 312—was a car of Romes—car of Fancy Romes, sizes ranging from 138 to 188—that combines large and small—five tiers and larger—this car was sold to Richard Ernest Moser for export to Hamburg, Germany. It was sold at a price of 65c straight thru—and we were obliged to pay the charges for getting it to Seattle—freight \$78.59—the net proceeds that we obtained for the car was \$389.80—I see it has been computed here—its a little less than 52c a box on the 756 box average.

The Court: How much of Brisky's fruit was in that car?

A. In that car was 46 boxes of Romes of Mr. Brisky.

Q. (Erickson) What was the date of shipment?

A. February 10, the date of shipment. The sizes ranged from 138 to 163—15 boxes of 163s in the car—a 163 Rome is a small Rome and less desirable, of course, than the other.

Q. There was no brokerage on that sale, was there? A. No, no brokerage.

Q. What was your next shipment?

A. There was quite a few small amounts—3—6—5 [134] and 7—I was trying to select some larg-

(Testimony of O. R. Barrett.)

er ones here—shall I take them in the order in which they come?

Q. Yes.

A. The next car is file 368—shipped on March 2—3 'C' grade Delicious—this was a car of what we call 'chop suey' car, sold to Johnson Fruit Company, Hastings, Nebraska. Contained 175 Romes, 252 Stamens—160 'C' grade Winsaps. The car sold at a flat price on all varieties, grades and sizes at 45c—total proceeds, \$339.35. I haven't computed that—we couldn't segregate the sizes—all we could do was to tell the price we sold it at which was 45c a box regardless of size, variety or grade.

The Court: That was net to you?

A. Yes, that was net to us. Yes that was net—with the exception of a small item of 85c for exchange.

Q. (Sanders) The fruit Brisky had in that lot was low grade Jons or Delicious?

A. 'C' grade—Delicious and small size—163 size.

Q. How would that compare with the other varieties that went in the car—would that be as good a grade—would it be the best that was in the car, the worst, or half way between?

A. I would say that was the poorest quality of anything in the car.

Q. So the fruit of Briskys that went in that car was the poorest of the lot?

A. I would say the three boxes were.

(Testimony of O. R. Barrett.)

Q. How much did we pay Brisky for that 'C' Delicious?

A. As near as I can tell—47c—it appears here.

[135]

Q. And we sold them for how much?

A. Forty five cents on the average of the car.

Mr. Sanders: That's all I have on that car.

Mr. Erickson: Now, the next sale.

A. File 371—shipped March 2d, contained five Fancy Romes we bought from Mr. Brisky—the sizes were 113 and 125, average size Rome—the car was made up of Delicious, Romes and Wine-saps—the Romes in the car were sold at 50c—

Q. Any brokerage on that?

A. No, this car was sold to the Atlantic Commission Company at a cash price.

Q. The next one.

A. File 378—shipped March 5th—7 'C' grade Delicious—the car sold at 42½c less the brokerage.

Q. How much was the brokerage?

A. Brokerage of \$30 on that car.

The Court: About how much a box?

A. 3.8 or three and three-fourths cents.

Q. To whom was that car sold?

A. Atlantic Commission Company—John Venura & Sons, New Orleans. File 379 is the next one. Car shipped on March 5th—contained 12 extra Fancy Delicious—163 small size, bought from Mr. Brisky—that car sold at a net price of 70c—the customer was the Atlantic Commission Company.

(Testimony of O. R. Barrett.)

Q. (Sanders) How much did we pay Brisky for those 12 boxes?

A. 97c I think—it was the poorest of the 97c—they were purchased at 97 for a range of sizes—163s. File 392, shipped on March 12. That car contained 8 Fancy [136] Delicious of medium size—113—125s—it was sold at 55c net straight thru on all sizes. The customer was the Wesco Foods Company. The next file is 390—contained two boxes of Fancy Saps, large size—shipped on March 10th—just two boxes in that car—one was size 88, which is the largest size, and the other 96. The price, 65c on all the Saps in the car.

Mr. Sanders: YTK was the price we sold at.

A. Yes, the price we sold at. There was about fifteen different varieties and grades.

Q. What did we pay for those Saps?

A. We bought them from Mr. Brisky January 8th—Saps—163s and larger at 80c—

Mr. Erickson: Thats for the extra Fancys, isn't it?

A. Wait a minute. These are the two Fancys—for the Fancy Saps on this statement was 65c for the large.

Mr. Erickson: Any brokerage on that?

A. No. This car was shipped to the Ryan Fruit Company in Butte, cash price—no brokerage. Then file 419—this car contained four extra Saps, shipped March 24—sizes 163—all 163—fruit was shipped in a car of all sizes at an average price of 70c, less brokerage of \$31.50.

(Testimony of O. R. Barrett.)

The Court: How did these four boxes compare in value to the average in the car?

A. Its about the average size—mostly 163s in the cars.

Mr. Sanders: How much did we pay Brisky for those four extra Fancy and larger—small 163s and larger?

A. We bought at 80c, the next smaller size at 75c [137] and the smallest at 65c. The next is file 435. Contained 11 Extra Delicious, shipped on April 13—car was 163s and smaller—Mr. Brisky's fruit in that car was 11 boxes—6 boxes 188s and five boxes 198s. The price the car sold for 75c net——

Mr. Erickson: Any brokerage on that?

A. No brokerage.

Mr. Sanders: That fruit cost us according to plaintiff's Exhibit 'D' 77 cts.

A. Yes, 77c.

The Court: The Brisky boxes were the smaller?

A. Yes, they were the smaller. 188 and 198. Thats about the smallest we ship ordinarily. Then file 445—this is the one I think Mr. Nessen discovered last night. I haven't had a chance to check it. I will see. This contained 25 boxes of Fancy Delicious—12 188s, 2 198s and 11 216s. That's very small. The car sold at 60c—less the brokerage of \$25. Fancy Delicious, I believe 175—216—bought from Mr. Brisky for 57c.

(Testimony of O. R. Barrett.)

Mr. Erickson: What is the date of shipment on that car?

A. April 20th. Shipped to Rubin Produce Company, Chicago. File 375—shipped March 3rd—contains 30 Extra Fancys Romes—150s and larger—car sold for 65c—net—Mr. Brisky had thirty boxes in that car.

Q. To whom was that sold?

A. Sold to Scott's Bluff, Nebraska—that's a branch.

Q. Branch of the Pacific Fruit?

A. Yes. [138]

Q. The price you allowed the dealer was 42c.

A. On the 150 Romes, 42c.

Q. Of course you have no record showing who the Scott's Bluff, Nebraska branch sold them to?

A. No.

Q. Have you any other file?

A. Did you get 361?

Mr. Sanders: No.

A. How about 361 and 370?

The Court: We have 370, not 361.

A. I must have missed 370—I found a couple more—361 was shipped on February 26, contained 14 Extra Delicious—163s and larger—sold for a dollar less brokerage of \$30.00. The customer was Shamrock Produce Company at Shamrock, Texas. The price to the grower would be that same 97c. I think that is all except Mr. Nessen said he had three files he found last night, and I have one of

(Testimony of O. R. Barrett.)

them. This was a truck shipped to the Coast, shipped on March 16th, truck No. 154—truck contained 698 boxes which was a full car load—of all fruit—the way we distinguish this one is from the Code—some Fancy Jons—21 lugs—notation on the inspection report is ‘good color’. We probably put them up ourselves in our warehouse. If it was some Jons bought in bulk that would account for that. This car was made up of all—a chop suey car—its not apparent from the file what those brought here—very likely we turned them over to our house in Seattle to handle and they did the best they could with them.

Q. There is no selling price disclosed? [139]

A. No.

The Court: How many boxes of Briskys?

A. This also shows 21 lugs—Brisky—very likely loose in the box. There should be one more that Mr. Nessen found.

Q. (Mr. Erickson) This is the one you testified to 30 boxes January 22, 1938?

A. Yes, this is the one we found—this is a car shipped on January 22d—

The Court: What is the file number on that?

A. 274—the complete file isn’t here—the invoice is missing—we had it here yesterday.

Mr. Erickson: Do you have any more records there of the disposition of the Brisky fruit, or is that all you have? A. All we have.

Q. Where are the rest of the files?

(Testimony of O. R. Barrett.)

A. They would be in the files at Cashmere.

Q. You didn't bring those up?

A. No, I think there were possibly six or eight boxes. Mr. Sanders checked that over Sunday. He brought one box. These were typical cases.

Mr. Sanders: You were not present at the time Mr. Raines and I made a search thru the files.

A. No.

Q. You haven't accounted for any sales that were made during 1937, in October, November or December—you accounted for no sales made up until January 22, 1938, have you?

A. January 22d, I think was the first. [140]

Q. That was the first tracing of the Brisky fruit you have made.

A. Of this fruit, yes. I am inclined to believe very little was shipped before this group of files because this is representative of all the Delicious, or most of them. Before that we thought the market was going to be higher and guessed wrong.

Q. As a matter of fact all the sales made in October, November and December were made at a higher price than those made in February and March.

Mr. Sanders: I must object to that. There is not a syntilla of evidence that we had any of Mr. Brisky's fruit available for sale during the period he mentions. The record before the Court at the present time shows in October we bought 10 F & F Jons, in November we bought some bulk Spitz, and

(Testimony of O. R. Barrett.)

November 26 we bought fourteen boxes of Extra Fancy Romes. Thats all of the Brisky fruit we had prior to December 18th, so the question as to what the market price on this fruit was back in October and November and prior to our dealings with the Briskys is absolutely immaterial. The record shows that is the situation.

The Court: What have you to say to that, Mr. Erickson?

Mr. Erickson: Well, we haven't yet accepted the data as to the dates the fruit was purchased from Mr. Brisky. The evidence isn't too clear as to just when that did take place. The purpose of the question is to show the general decline in the market.

The Court: The objection is sustained. [141]

Mr. Erickson: Then I will ask the Court if a question is proper based on their own figures—if I reframe the question in regard to the dates as set forth in their own figures.

The Court: You mean after the 18th of December——

Mr. Erickson: After the purchase dates here—I believe there are some in November—they say they made some purchases in the month of November.

Mr. Sanders: We purchased 68 boxes of bulk Spitz and 14 boxes of Romes—thats all we bought in November.

The Court: I will let you prove the market value of the apples purchased or delivered from

(Testimony of O. R. Barrett.)

Mr. Brisky a week after they were purchased in each instance—I don't know as I will ever consider the testimony but I want to get in the whole picture—whether or not that makes up the picture from what you think you can show. But I don't think you can prove generally a declining market.

Mr. Sanders: (To witness) At the time the auditors came in to check the records all of these various files were available at that time?

A. Yes, they were.

Q. Approximately how many boxes of apples did the Cashmere branch handle that year?

A. That would be about six to eight hundred carloads—not all apples—there were some pears and other things.

Q. You have handled that many each year subsequently?

A. I think it would average pretty well.

Q. So there have been approximately 500 cars per year passed thru there since these records were current. [142]

A. Yes—thats five years ago.

Mr. Erickson: I will ask you to state whether or not the market declined between December 18th—

Mr. Sanders: One week would make it December 25th——

Q. ——December 25th—between that time and January 22d.

Mr. Sanders: I object to that on the ground its immaterial—there is absolutely not a syntilla

(Testimony of O. R. Barrett.)

of evidence before this Court that during that period we converted any of these apples. The evidence shows that had the Government used ordinary diligence they could have had all of this data—they sent three men into our office—the records were all there—now, years later, they put the burden on us to furnish their evidence, when, if they had wanted to know what happened to those cars when the files were current files—the three men could have had it. I submit the Government hasn't shown any degree of diligence in preparing its case.

The Court: Now, on the general objection I am going to overrule it. I want to get as much of this picture as I can. I don't know how much I will consider it, but would like to get, if possible—maybe this witness does not know—if there was a fluctuation in price did that affect the different grades of apples or different kinds of apples uniformly?

A. Well, no, it would never do that. However, as I recall that was a disastrous year—there was a difference of opinion among the shippers about the Holidays as to whether the market was going to be strong, or not. But I think around the Holidays, or shortly afterward most of the shippers [143] gave up hope. I think about January 8th was the last date we had any optimism.

Q. Now, on December 18th what did you buy?

(Testimony of O. R. Barrett.)

A. The big bulk of the Jons—250 Extra Fancy—23 Fancy and 93 Fancy——

Q. Is it possible to tell what the market on that type of apple was a week afterward?

A. I think we could get an idea from our files—however I think it is apparent we buy a lot of fruit in bulk—I think we are, possibly, the only ones that do in the district—to take care of these small branches of ours—like at Hoquiam where they have a lumber camp nearby and want a certain type of cheap quality. We do a lot of that. It really aids the grower in disposing of a lot of fruit he couldn't market to high class trade—and a good portion of that it would be impossible to tell where we bought that particular lot of fruit. I don't know the quality—Mr. Cochran bought it; I believe he did business with Mr. Brisky for years—I am not familiar with the Brisky orchard. I would say we have a lot of growers we are able to market their crop when very few other dealers can.

The Court: Its not so much a matter of what the Pacific Produce Company did, but was there a market price. Mr. Phipps started yesterday to testify as to the market price on such and such a date——

A. I am not a marketing agent, although I have been a salesman. Anything as perishable as a box of apples there is no such thing as a definite market price on any [144] one day even. When it comes to grades and varieties and sizes that is

(Testimony of O. R. Barrett.)

about as close as you can standardize it. Then when it comes to condition—when you come to color—some orchards have an inherent weakness—perhaps just show a lighter calix—something inherent in the apple—nothing that will hurt the apple—a lot of markets choose that stuff because they can get it from five to ten cents a box cheaper—we do a lot of that business because a lot of our branches in areas where they supply lumber camps, to them whether an apple has any particular color or sting or two would be immaterial. We can buy cheaper and sell cheaper and make a margin of profit. You can't standardize the price, even on standard varieties. There might be a variation of ten to fifteen to twenty cents a box, that is, the same day, among shippers—I might sell a car of fruit and get \$1.20 down in Birmingham, Alabama, because there was a dealer down there said he was willing to pay that——

The Court: The effect of your answer is you can't answer the question.

A. You can't determine the markets, no. Nobody can.

Mr. Erickson: Q. The apples were cheaper as a general rule in January, February and March than they were in the month of December?

A. I don't think there is any question about that—it was steadily declining all season—the latter end of the season it was terrible.

Q. You, in your computation here I think have

(Testimony of O. R. Barrett.)

accounted for the shipping of 90 to 91 boxes of Extra Fancy Delicious— [145] in your report to Mr. Brisky you have only reported here receipt of 47 boxes, have you not (referring to Defendant's '1') under January 8?

A. You are attempting to check the accounting troubles between the Pacific and the farmer?

Q. Yes, that is what I am trying to find out.

A. I assumed they would check that immediately. Mr. Brisky gets his statement and so does the Farm Security Administration. These figures were taken by the Farm Security Administration auditors.

Q. Mr. Barrett, referring to Plaintiff's Exhibit 'D' on January 8th, 1938, your records show a purchase of 47 Extra Fancy Jons, 163s and larger—97c—that was 47 Delicious, was it not?

A. I presume so from what has been brought out here.

Q. Also on the same date 45 Extra Fancy Jons—145-216—67c——

A. All of those 67 items are broken down apparently between Jons and Delicious.

Q. There is a difference in price given Brisky of 20c between 163 and larger and smaller sizes—between 77c and 97c.

A. On account of size. Usually twenty to twenty five cents difference between five tier apples and the larger tiers. That's what that indicates.

Q. So that in your accounting on sales this

(Testimony of O. R. Barrett.)

morning you showed 90 boxes of 163s and larger sold from Mr. Brisky and on this ticket it only shows a receipt of 47 boxes in all from him. [146]

A. This thing is obviously wrong as between Delicious—this undoubtedly was all one transaction. This is an error on this form and has nothing to do with our records. Our own records in the office—in the ledger sheets would be the correct records.

Q. You think that isn't a correct record?

A. I know this isn't when it comes to the Delicious.

The Court: Will the Brisky sheets at the office show me what your records actually show?

A. He gets a copy of all of these tickets involved in this—all the growers do—if he has those they should correspond with our records and show all the details. Mr. Sanders and Mr. Raines had spent I think most of the day Sunday looking for these things. When it comes to storage tickets five years old its our policy to destroy them after about two years to conserve space. They pile up. I went up there a few minutes Sunday and there were dozens of boxes. I think they made a pretty thoro search and they had been destroyed.

The Court: From plaintiff's Exhibit 'B' I can get what information I need.

Witness: That coupled with the items in the ledger should coincide with these items. These figures were taken by the resettlement auditors di-

(Testimony of O. R. Barrett.)

rectly I believe from our records—our copies of the receipts given and all the details they regarded as necessary.

Mr. Erickson: Referring to Exhibit 'A' this item marked January 8, 1942, ticket No. 12442, 189 Delicious—92 X F 83 Fcy—14C—less adv. Stg.—that was the net [147] price quoted to the grower.

A. That would be broken down on the tickets from which you got your records. This bracket indicates the original records from which you got your tickets.

Q. You have the ticket 12442 in Court?

A. No, we couldn't find any of those tickets of that age. Isn't that true, Mr. Sanders?

Mr. Sanders: I believe so. We have a lot of things here but I don't believe that is among them. At least I couldn't locate them.

Q. You would say this would be the net price less storage and advertising—this price quoted here—\$135.64.

A. I don't get the distinction between gross price and net price that has been discussed here. We just have one price. The price we pay the grower.

Q. How do you explain 'advertising'—

A. We act as collection agent for the advertising department and take one cent from the grower and then turn it over at the end of the season.

Q. How do you explain 'less storage'?

A. Now it could be possible here if Mr. Cochran

(Testimony of O. R. Barrett.)

had a block of fruit that had been packed out for Brisky and Mr. Brisky didn't know whether he wanted to hold it or sell it to us—well, we might have to shift it around two or three times—and we might make a warehouse charge for leaving it on the floor—changing his mind——

Q. You don't think this has anything to do——

A. I think its probably for shifting the fruit [148] around in the warehouse.

Q. Wouldn't you think that would show in your books when it says 'less advertising and storage.'

A. For years 'warehousing' just means extra work around the warehouse.

Q. That price you quote there is the price after you deducted storage.

A. I don't know what you call 'deducted.'

Q. I mean this item here of \$135.64 is the amount you allowed Mr. Brisky after making some deductions for storage.

A. No, only the agreed price between Mr. Cochran and Mr. Brisky that day. What factors they considered in determining that price, I don't know.

Q. If there were no deductions for storage it would be in excess of \$135.64—wouldn't it?

Mr. Sanders: I think your Honor he is getting into a great deal of speculation. Here are two men, Mr. Brisky and Mr. Cochran—they get together and strike a bargain. What they talked about as they went along was unknown to some

(Testimony of O. R. Barrett.)

bookkeeper who posts an entry on there—Why didn't he bring Mr. Cochran into Court who actually handled the transaction. The whole Government's theory is its up to us to furnish the records.

Mr. Erickson: I subpoenaed your records and the men who knew about the records. I didn't know who they were.

The Court: He has been asked two or three times and says he doesn't know. [149]

Q. You don't have the records here then to show the disposition of the other part of that 1057 boxes, do you? A. Not here.

Q. Those records are available at Cashmere?

A. Yes. We don't destroy car files—we keep them from year to year.

Mr. Erickson: At this time I would like to make a demand those records be produced in Court.

Mr. Sanders: In that connection I better be sworn in regard to that demand. If the Court will take my oral statement without oath. That subpoena was served on us on Saturday evening. I, personally, and the manager went up there Sunday hunting records—piles and piles of boxes there. There were records there of some 2500 cars since this business, and how many before I don't know. We spent that much time in endeavoring to do it, and these are all the files we could find. I was back up there again Monday and hunting records, and this is all we were able to get in the

(Testimony of O. R. Barrett.)

limited time. And I submit for Counsel at this stage of the proceedings to come in and make a demand is absolutely unreasonable. This case has been set for months. He had all the opportunity in the world to do it, and he can't come in at this late date and serve a subpoena that is humanly and physically impossible to comply with.

Mr. Erickson: I wish to make this statement. I talked to Mr. Sanders on the 15th of April and told him exactly what we wanted to have for this case and that a subpoena would be prepared and served— [150]

(Discussion.)

The Court: You can't make a demand like this binding on anybody. You can't issue a subpoena saying 'bring in all your records'. There is some responsibility on people starting law suits to know what they want. I will refuse the demand on the ground it wasn't made timely.

Have you any idea, Mr. Barrett, what percentage—you have given us 298 out of 1057 boxes—of the 298 two of the shipments, including 44 boxes, are to your branches. I assume it is a fact it is more difficult for you to find the other files what you haven't produced. Mr. Sanders wasn't able to find in a couple of days due to the fact those shipments were probably made to your branches—

Mr. Witness: Thats probably true. I don't give the same care to the branches I would to any borrower.

(Testimony of O. R. Barrett.)

The Court: What percentage of your business is done with the borrowers—have you ever figured it up?

A. It varies generally with the season. Take the condition that exists here. Our manager's function is to give our wholesale houses all over the country good service—to see he has enough fruit on hand and the type he knows the different communities use. It will vary with the seasons and the varying conditions.

The Court: Well, what percentage?

A. Taking the community as a whole and our shipping branches at that time—Wenatchee, Cashmere, Dryden, Chelan, Yakima, Buena, I would say roughly—lumping the whole business, perhaps about 75% of our volume even in a poor year like this would be for the branches. That's what we [151] build our warehouses for and operate them. During the past three or four months I will say our Yakima house, for example, has not done 5% of the business outside of the organization. The market right now is firm on apples and our branches are taking all, and as a result we are not selling to outsiders—we sell the fruit for our own branches.

Mr. Erickson: I think that's all.

Mr. Sanders: No questions.

B. R. PHIPPS,

recalled, testified as follows:

Q. Mr. Phipps, directing your attention to about the 18th day of December, 1937, state whether or not you were acquainted with the market price in the community of Wenatchee of Jons, Extra Fancy, 163s and larger.

A. I was acquainted with the record available to me, yes.

Q. Were you personally acquainted and knew the market price? A. Yes.

Q. State what the market price per box was on December 18, 1937, of Extra Fancy, Jons, 163s and larger.

Mr. Sanders: If your Honor please, I wish to object on two grounds, first, there is not a syntilla of evidence before this Court that we converted any of the fruit at that time. That was the date on which we bought the fruit from the farmer, and not the date on which we sold it. The Government has shown an absolute disregard for an effort to obtain the information in regard to the time we did convert the fruit. The time we converted the fruit [152] according to our statement and according to the Court's ruling was the time the fruit lost its identity and being shipped out in a car—that is the rule the court has laid down. I wish also to add its immaterial, and I wish also to further object unless the witness can testify that the fruit, the condition of the fruit, considering its defects and one

(Testimony of B. R. Phipps.)

thing and another, was identical with our fruit, then the evidence is absolutely worthless. Because somebody sold some fruit at a particular date at a particular value that is not evidence of any value as to what another particular lot of a commodity that is perishable as apples are.

Judge Schwellenbach: Overrule the objection. The question is—what was the market value for the week following December 18th—not on December 18th.

Mr. Sanders: May we have an objection to all of this testimony without interrupting each time?

Judge Schwellenbach: Yes—. My theory, Mr. Sanders, is if you were ultimately responsible for the fact it is impossible to prove the market value because of the fact you took the fruit which you converted and shipped it would to—what is it—90 different branch houses around the United States—the rule in reference to conversion of stock where the measure of damages is the market value between the time they got the stock and a reasonable time afterward, within which plaintiff can make demand for return of the stock, the Court has held a week or ten days is a reasonable time. The rule may be completely negatived in this case by other [153] factors but I want that testimony in—what the market value is within a week after the car sales. I may not pay any attention to it, but I want the opportunity of hearing it. I will overrule the objection. Your objection may go to all of this testimony.

(Testimony of B. R. Phipps.)

Q. Will you state what the market value was the week following December 18, 1937?

A. That would be the week of December 17 to 25—am I right on that?

Judge Schwellenbach: The 18th to the 25th.

A. Well, the market at that time in Seattle was \$1.00 to \$1.25.

Q. I mean Wenatchee—the market price in Wenatchee.

The Court: These are on Jonathans.

A. Extra Fancy, yes sir.

Q. 163s and larger.

A. I don't happen to know of that, Mr. Erickson. I have knowledge of the Seattle market.

Q. Well, what was the freight rate?

A. 11½ cents.

Mr. Sanders: I submit the Seattle market has nothing whatever to do with this. I submit the Government certainly must produce some proper evidence and he can't quote the market in Seattle or Timbuctoo, or some other place—we are here in Wenatchee.

Q. Do you know from your independent recollection what the price was in Wenatchee?

The Court: I will sustain the objection. He qualified himself yesterday not as a dealer in apples but because [154] of servicing a large number of loans in the Wenatchee Valley and as a result of that he kept track of what the market price was in Wenatchee. I sustained the objection on the ground he wasn't qualified.

(Testimony of B. R. Phipps.)

Q. Well, the week of December 18 to 25—1937—in size 175-216—were you acquainted with the market value Extra Fancy Jons in Wenatchee?

Mr. Sanders: I think this witness has already disclosed the fact his information was on the Seattle market, and not Wenatchee.

The Court: Did he answer it—I think he said he didn't know.

Mr. Erickson: I am asking him on this smaller size. A. It would be 70c.

The Court: How did you get that information?

A. From the Bureau of Agricultural Economy.

The Court: As to the price in Wenatchee?

Witness: Taking it from the shipping records. Those were the records available to me at that time.

The Court: I will sustain the objection.

Mr. Erickson: May I ask the witness a few questions on voir dire—I don't believe he understands.

The Court: He says he gets it from something the Department of Agriculture sends him—I can get it the same as he did.

Mr. Erickson: I would like permission to ask the witness a few questions on voir dire as to his independent knowledge and refreshing his memory from a few sheets he has there. This was five years ago and obviously the witness [155] can't testify without something to refresh his memory five years back.

(Testimony of B. R. Phipps.)

The Court: I realize that. The Government can't send this man a statement and then the Government use him as an expert testifying from a statement the Government sent.

Mr. Erickson: I thoroly realize that.

The Court: Go ahead and ask him some questions.

Q. (By Mr. Erickson): Mr. Phipps, what were your duties in Wenatchee in the 1937-38 marketing season?

A. My duties were to work with the grower from the standpoint of seeing how their fruit was sold—where it was sold—the standpoint of seeing the fruit was properly accounted for and the basis of the sales that were made.

Q. Did you likewise visit the grower and the warehouse and confer with them from time to time in regard to the apples and the selling prices and so forth? A. Yes.

Q. State whether or not you contacted the Farm Security Administration from time to time in Portland, Oregon, and reported the results of your conferences in Wenatchee. A. Thats true.

Q. During that particular time, that marketing season, were you acquainted—your own knowledge of the market price on certain qualities, varities and size of apples?

A. Yes, I had to be.

Q. You don't remember that price now on a particular date?

(Testimony of B. R. Phipps.)

A. No, only as I refresh my memory from records I have. [156] I couldn't recall the statements that were given to me on the accounts so far as prices that were received.

Q. If you were asked what the price of apples would be here in court on a particular time in 1937 what would you base your statement as to the price upon?

A. It would be only on the records—I can't go back to the time of the sales and recall the definite sale prices. That far back it is impossible. The only manner in which I could do it would be some of the records that were used in the office and the sales information available to me.

Q. At the dates during that year, state whether or not——

Mr. Sanders: Just a minute—ask him what he received—don't tell him what he received.

Q. What did you receive having to do with the price of apples from day to day during the 1937 market season?

A. We received reports there with regard to shipments of fruit.

Q. And state whether or not those reports correctly and accurately stated the market price.

A. We considered it the market price.

Q. You considered those reports stated the market price? A. Yes.

Q. By referring to certain memoranda that you have you may state whether or not you would or

(Testimony of B. R. Phipps.)

would not be able to correctly testify as to the market price on a particular date for the 1937 marketing season. [157]

A. I could within a week of the dates on either side.

The Court: Why do you say a week?

A. Because I have my sales information based on the record I had at those particular times.

The Court: Are these sources of information from various growers?

A. This is a record of sales that were made that I refreshed my memory from—sales information I took at the time the records were available to me.

Q. Where did you get them from?

A. One source of information I had was the Bureau of Agricultural Economy reports what came to our office each day. We followed the Seattle and Wenatchee markets so far as sales were concerned, using that as a basis for sales. That was one source of information we had. We didn't have time to go around and contact each warehouse each day.

Q. (By Mr. Erickson): State the extent to which the fruit industry used these same reports.

A. We had some three hundred growers and had to follow the markets in a general way with what contacts we could make with the warehouses themselves.

Mr. Erickson: Mr. Kaseberg would like to ask a question.

(Testimony of B. R. Phipps.)

The Court: Any objection?

Mr. Sanders: No.

Q. (By Mr. Kaseberg): (I would like to ask one or two preliminary questions. I merely want to summarize what this witness has already testified to.) You testified that in this particular week from December 18 to the 25th [158] that you were acquainted with the market price of fruit in Wenatchee. A. Yes.

Q. You testified you have received daily from the Bureau of Agricultural Economy of the Department of Agriculture the marketing service reports—reporting sales. A. That's right.

Q. Those were received from day to day?

A. Yes.

Q. State whether or not at the present time you have an independent recollection of the market value of the fruit of the size pronounced in the previous questions during that week. A. No.

Q. You have no such recollection—I hand you plaintiff's Exhibit 'F' for identification and ask you whether or not those are the copies of the sheets you received from the marketing service maintained by the Bureau of Economy.

A. They are the same.

Q. I will ask you whether or not at the time you received those marketing sheets they set forth the market value of the fruit on the respective days therein according to your own personal knowledge at that time?

A. To the best of my recollection they did.

(Testimony of B. R. Phipps.)

Mr. Kaseberg: If the Court please, the plaintiff offers them in evidence. If the witness knows at a time in the past that the memoranda sets forth the correct statement of what he knew of his own independent knowledge and at a said date—he might not have that independent [159] recollection but can testify as he has done, that the document which he knew at that time set forth a written memoranda of what he knew to be from his own knowledge to be correct then the written memoranda itself is admissible in evidence.

Mr. Sanders: I wish to object on the ground it is not proper evidence as the witness has testified the knowledge he had he got from this. Now this is the very thing gotten out by the Government, and he testified he didn't have time to go around and contact the growers and warehouses—his knowledge was obtained from this—. As your Honor has said—you can pick this up and be as good an expert as he is, and I submit that is not the way to prove market price. I submit this is not admissible.

(Discussion.)

Judge Schwellenbach: It seems to me with all the facilities of the United States Government in preparing this case for trial over a period of two or three years they could have gotten somebody in Wenatchee qualified to testify from his knowledge what the market price was at that time. When you get down to it all this witness has testified is what he has taken off these reports.

(Testimony of B. R. Phipps.)

Mr. Kaseberg: No, your Honor—he is testifying that on that particular date in question this was a written memorandum of the price he knew to be the market price of his own knowledge on that date—

Mr. Sanders: He knew—the reason he knew it was the market price was because he read it on that sheet.

Mr. Kaseberg: No, that isn't the truth. [160]

The Court: Where does it show Wenatchee?

Mr. Kaseberg: Near the bottom of the first sheet—

The Court: If Counsel wants to come in for a minute I will say frankly I want to see what Mr. Wigmore has to say about this problem.

Whereupon Court recessed, after which time, all parties present, the trial proceeded.

Mr. Phipps resumes stand.

Q. (Mr. Erickson): Mr. Phipps, we were speaking about plaintiff's Exhibit for identification, I believe its No. 'F'—will you state again just what that exhibit purports to be or what that exhibit is.

A. Its a report on prices of shipments of fruit out of the Wenatchee area on given days.

Q. State the extent of its use by the people engaged in the fruit business in Wenatchee.

A. Well, its available to the growers or any one that happens to request the information.

Q. State the extent of its use.

(Testimony of B. R. Phipps.)

A. Its used as a report—it gives the basis of the sales made.

Mr. Sanders: Thats not answering the question.

Mr. Erickson: Maybe I am not clear.

The Court: To what extent is this report used in the Wenatchee area?

A. I don't know how much its used. Its there—if that is what you have reference to.

Mr. Erickson: Explain as much as you can about the use of that report. [161]

Mr. Sanders: What you actually know of its use. Not who could use it but who actually was using it, if you know.

A. Well, the growers use it as a basis for having some information on sales.

Q. State whether or not its used by the warehouses.

Mr. Sanders: I submit now he is getting around to the point where he is asking leading questions. I think its perfectly obvious this witness doesn't know.

Mr. Erickson: He can say he doesn't know.

The Court: State the extent to which its being used by the warehouses.

A. I don't know that it is used by the warehouses. Its available to them.

Q. State the extent to which it is used by brokers and other dealers.

Mr. Sanders: I think he should be asked whether he knows whether brokers use it.

(Testimony of B. R. Phipps.)

A. To the best of my knowledge I believe they do.

Mr. Sanders: I move the answer be stricken.

The Court: The question is the extent to which it is relied upon and proved worthy of reliance in the community. What do you know about that, Mr. Phipps?

A. I am not qualified to say just how much it is used, I don't believe.

Mr. Erickson: State the extent to which you used it.

Mr. Sanders: Your Honor, I think the answer settled the whole score.

The Court: He said he wasn't qualified to answer the question. [162]

Mr. Erickson: I submit the witness doesn't seem to be qualified. I am frank in stating to the Court I don't believe from his answer he is qualified to state the extent of the use of that report in the community of Wenatchee, therefore I take it he should not be permitted to answer any further questions to do with the market price. I would like to call Mr. Raines and see to what extent he uses this report in the Pacific Fruit, if he knows anything about it.

(Witness excused.)

The Court: Mr. Raines, come forward.

C. D. RAINES,

recalled.

Mr. Erickson: Q. Mr. Raines, referring to plaintiff's exhibit for identification No. 'F' U. S. Department of Agriculture, Bureau of Economy, reports, did you use those in 1937 and '38?

A. No sir.

Q. Are you familiar with those reports to any extent or used them to any extent?

A. They have no value.

Q. If you haven't used them you don't know what value they have.

A. I have seen them. We get them.

Mr. Erickson: All right. That's all. [163]

MERLE F. SHONS,

a witness called for and on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Referring you to this plaintiff's No. 'F' for identification, are you familiar with that report?

A. I am familiar with it. However we don't take it any more. We have taken it.

Q. Did you use it in 1937 and 38?

A. No, I didn't.

(Witness excused.)

Mr. Erickson: We haven't any testimony here to sustain this report. That is all. The only theory we can offer this on would be if it was known to Mr. Phipps to be correct at the time he received it, and went over it from day to day, Mr. Phipps being acquainted with the marketing of fruit in the community.

The Court: He didn't answer that question. He said to the best of his recollection it was correct. I think it is better to stick to the standard Mr. Wigmore lays down that such reports are admissible if there is testimony to show they are generally relied upon on the basis of sales. We have had no testimony on that point.

Mr. Erickson: That is our case. We will withdraw Identification 'F'.

(Whereupon Court adjourned to 1:30 P.M. at which time, all parties present the trial proceeded as follows:) [164]

Mr. Erickson: May it please the Court, due to the unforeseen shape the testimony for the Government has taken due to the fact that we are unable to bring certain other witness here at this time I move the Court for a voluntary non-suit at this time.

The Court: This is my first experience with that under these rules.

Mr. Erickson: I understand I will have to file a Motion in writing, but have just been considering it during the noon hour, and talking to Mr. Kaseberg about it, and in as much as this is a test

case I don't think the shape the testimony has taken that your Honor will be able to arrive at a formula.

Mr. Sanders: You mean to dismiss the entire suit?

Mr. Erickson: With the privilege of *case* at another term of Court.

Mr. Sanders: I am not familiar with the Federal rule on non-suit. If its like the State Court—in the State court you have to start a fresh suit against us.

The Court: Yes, you have to dismiss your whole case. This is the rule. Rule 41. (The Court reads rule 41 on Dismissal of Actions.)

Mr. Sanders: I take it is discretionary with the Court to grant it or not. He has no absolute right to dismiss at this stage of the proceedings. Its a matter discretionary with the Court on such terms as the Court shall provide. [165]

The Court: Yes.

Mr. Sanders: Frankly, your Honor, I don't believe after putting us to the expense in this matter—coming over here and then in the way they have shown their diligence I don't think the Court should grant it. I don't believe they have made out a case. I think the case should be dismissed with prejudice because they haven't shown any type of diligence from one end to the other.

Mr. Erickson: The testimony on behalf of the Government's witness, Mr. Phipps, was a surprise to the Government—that he was unable to qualify

as an auditor on market values, and without his testimony it would be impossible to give the Court a basis for computation of these accounts, and there has been no lack of diligence on the part of the Government. This is merely one of the things that might come up in any law suit—a condition such as this—without any one being able to foresee just exactly how it was going to come up.

Mr. Sanders: I don't think Counsel has a right to be surprised at the testimony of one of its employees. I think with any degree of diligence at all—if this were a witness they subpoenaed from some outside source there might be a basis for raising a question. It's the Government's own employee, and the man that had to do with this from its very inception. At this time I move for a dismissal with prejudice. I feel the Government has had every opportunity—they have put us to tremendous expense and haven't even made an effort [166] to prepare their case. Right from the very beginning they have done nothing to prepare the case except to see that we come over here and bring all the evidence.

The Court: I wouldn't consider granting the motion without some substantial payment of costs. Costs are not taxable against the United States. I would just say you couldn't start another law suit until the Government has paid something——

Mr. Connelly: May I address the Court: Your Honor knows, of course, how very recently my appointment to the office of the United States District

Attorney has been. I had just a brief opportunity to discuss this matter with the men in the office. I knew the legal department of the Farm Commodity Corporation had something to do with it. There were a series of cases, as I understood it, of which this case is one, and this particular cause of action was to be a test case for other causes of action in this particular case. I am not assuming any blame for any lack of diligence either for myself or my office. If that has appeared here during the development of this trial its one of those regrettable things. My further understanding is this case is quite far reaching. It has affected the financing of the apple crop. It affects certain methods used under the subordination agreement which the Government has not been overly satisfied with, and I believe in fairness to the apple grower and the Farm Commodity Corporation, and to this defendant, that a proper trial of this matter should be presented if the Court feels there has been a break down in some of the evidence, [167] and that I rest with the discretion of the Court.

I do not think at this stage of the proceedings that terms should be imposed on this motion if an order for dismissal without prejudice is granted.

The Court: We have had no case in this Court involving the question of non-suit. Under the rule just what discretion is left to the Court? We do have available all the rules and decisions. I would like to take a look at them. I am not worried about the possibility of making terms, because I would

just make an order of voluntary non-suit contingent upon the payment of terms with the provision in it, if they were not paid then there would be an involuntary non-suit of dismissal. I don't see any difficulties there, but I will take the matter under advisement for about 15 minutes. If you gentlemen want to come in and look thru the same source I am looking thru you are welcome to do so. We will now take a recess until 2 P.M.

Whereupon Court adjourned to 2 P.M., at which time, all parties present, the following proceedings were had.

The Court: I have examined all of the cases which have been decided with the adoption of these new rules, and it is apparent that the definite purpose of the rule is to prevent a plaintiff in a law suit who, thru no fault of the defendant finds himself at some point or other during the trial in a position where he wants to take a voluntary law suit or dismissal without prejudice and without compensating the defendant for the expense he has been put to. [168]

In the case of *Welter vs. Du Pont Company*, 1 Federal Rules Decision—551—the District Court of Minnesota said this: “* * * Rule 41 A (2) was undoubtedly framed so as to prevent the voluntary dismissal of an action upon the mere whim of the plaintiff after Answer was served where defendants have gone to considerable trouble and expense appearing for trial and the matter has been pending for over a year and no equities are shown or

made to appear on behalf of plaintiff's motion for dismissal. It seems evident that the Court would abuse its discretion in permitting such dismissal and relegate the defendants to a few dollars by way of statutory costs. But unless it appears that reasonable terms and conditions can not make the defendant reasonably whole I question that the Court should deny the motion. The right to dismiss before verdict has been long recognized by our Courts".

Another case, *McCann vs. Bentley Stores Corporation*, 34 Federal Supplement, 234 at page 235, Judge Otis, whom you know has had considerable experience, has this to say: "The question for decision is whether plaintiff shall be permitted to dismiss this action without prejudice and if so upon what terms and conditions. Rule 41 (a) Rules of Civil Procedure for District Courts—28 U.S.C.A. following Section 723—provides in paragraph (1) for a dismissal without prejudice after answer upon stipulation. Paragraph (2) provides "except as provided in paragraph (1) of this subdivision of this rule an action shall not be dismissed at the plaintiff's instance save [169] upon order of the Court and upon terms and conditions as the Court deems proper. Unless otherwise specified in the order a dismissal under this paragraph is without prejudice. I consider that paragraph (2) of rule 41 (a) is one of the most valuable improvements over the old law accomplished by the new rules. The evil aimed at by the rule most largely is mani-

fested in the extreme situation described. To a lesser extent it is present in any instance in which a defendant is damaged by being dragged into court and put to the expense with no chance whatever, if there is a dismissal without prejudice, of having the suit determined in his favor. The dismissal without prejudice means the defendant has been put to the expense literally for nothing. When the Supreme Court promulgated this rule and provided that the Court might permit a dismissal without prejudice "upon such terms and conditions as the Court deems proper"—what sort of "terms and conditions" was contemplated? I have found nothing in the books upon which to base an answer, but no "terms and conditions are conceivable except such as are calculated to compensate the defendant for the expense to which he has been put. In the only public opinion dealing with paragraph (2) of Rule 41 (a) that is the view taken by the Court. *Paul E. Hankinson Co. vs. Goodman D. C.* 32 F. Supp. 732. The Motion to dismiss without prejudice in this case will be sustained only if the defendant is reimbursed its expenses." [170]

In this case I am frank to say if it were merely a suit brought upon this one cause of action and didn't involve nineteen other causes of action I would not hesitate in denying the Motion for dismissal without prejudice, and would pass upon the case upon its merits. Just hastily glancing at the figures—assuming plaintiff is right in this case they are entitled to recover the difference between 60c

and whatever was received by this Company. In the few sales that were made plaintiff could not recover more than forty or fifty dollars. I haven't yet made up my mind whether or not this subordination agreement is to be construed the way the plaintiff wants it to be construed, or the way the defendant wants it to be construed. However, there is in this case a matter of general policy which I think I should take into consideration in passing on this motion. Here we have a case involving the assistance the Government rendered to the Wenatchee Valley in allowing the initial financing during the year 1937. I may be overly sensitive to the obligations of those who do business in the Wenatchee Valley, fruit men, including this defendant, should recognize toward the Government for the assistance that has been rendered to them during the last [171] ten years. Nobody would be in business in the Wenatchee Valley and the Pacific Fruit and Produce Company would not be in business in the Wenatchee Valley were it not for the fact the initial financing has been furnished by the Government. There wouldn't be enough orchards left in the valley to justify the operation of the apple business there. Every year I have been in Washington when February came around back would come a delegation wanting to get some initial financing for the spray and to get started. There is a very definite difference between financing an apple crop after the fruit has been grown and just going out into an orchard that isn't sprayed—isn't

cleaned. Those who are dependent for their very existence on the orchards in the valley, warehouse men, commission men, and all of the various people, simply wouldn't touch it until it has gotten beyond the initial stage, and year after year I, personally, would travel from department to department in Washington, to get some of this assistance, and I know something about the original financing in this case, and some of the difficulties of getting the original financing. This case has been pending a long time. It should have been prepared. The defendant has been put to the expense, and should not have been put to the expense. Now the rule is the Government is not responsible for costs, and there is no way the Government can be compelled to pay costs in the ordinary sense of the word. These young men went out to examine the books, and did not examine the books. One of the witnesses testified—what to me would be the first book I would look [172] at and inquire for—and in out of twenty instances did they look at that book—and that is the ledger.

Now, if the plaintiff's contention is correct the defendant in this case did take those apples on which they had a mortgage, on which they had only subordinated themselves to the extent of 60c per box, and mixed them in with their own apples and made it extremely difficult for the Government to ascertain just what the situation was, but not sufficiently difficult to excuse the failure of the Government to get this information. It was my idea

last night that on the apples the Pacific Fruit Company had delivered to other warehouses and by their own act had made it impossible to prove the selling price of those apples, therefore the Government was entitled to prove damage by showing what was the reasonable market price of the apples during that same year. Then this morning the Government's witness admitted he wasn't qualified to answer the question. With all the facilities the Government has at its disposal and all the people in the Wenatchee Valley competent to testify as to market values, it certainly isn't justifiable for the Government to come in with one witness and say "I'm sorry but we can't prove it and therefore give us a voluntary dismissal and we'll start all over again" and put the defendant to the expense of preparing it again. I will say, frankly, if this case is started again, and the trial starts out the same way this has, without any preparation it just isn't going to trial.

Its impossible to determine how much the defendant [173] has been compelled to spend as the result of preparation of this case. If it is brought on again the two should merge to a certain extent. I find a case in the Second Circuit, DeFillipis vs. Chrysler, 116 Federal (2) 375, in which the Court entered an order. In that case the case was ready for trial upon the plaintiff's insistance, and it didn't go to trial. On the day of trial after the defendant was there with a lawyer and witnesses the plaintiff moved for voluntary non-suit. On April 4, 1938,

this motion was granted upon condition that the plaintiff pay to the defendant \$250 within thirty days with the stipulation if no such payment was made the case would be dismissed with prejudice. The thirty days went by and nothing was done. No final judgment was entered, and then plaintiff's lawyer—plaintiff got a new lawyer, and he attempted to appeal from that order and judgment after one and a half year's time. The Court said this:

“Purely as a matter of form the procedure below left something to be desired. When the time for the payment of the terms imposed expired without compliance with the order the entry of an order which took cognizance of that fact and dismissed the suit would have done away with any possible doubt as to whether and when a final order had been made. But here we do not think it necessary to decide whether the dismissal became final on June 18th, 1938, when the last extension ran out. If it did there was no appeal, and the District Court had no power to grant the motion as about a year and a half had gone by and the term [174] in which the order of dismissal was made had long since expired. Assuming, without deciding that it was not a final order, the Court did have jurisdiction with power to entertain the motion to modify the order appealed from denying the motion was clearly right. It was addressed to the discretion of the Court, and no reasonable excuse for the failure to make the required payment was presented.

Though still not in form a final order, it was one in effect for it finally determined that the dismissal was with prejudice and fixed the right of the parties thereto."

I will enter an order here of dismissal in response to plaintiff's motion, and provided that unless within forty five days from this date plaintiff shall pay to the defendant the sum of \$250 that the order of dismissal will be with prejudice and on that date I will sign an order of dismissal without further notice to the parties.

Mr. Sanders: May I say I think \$250 is a very low figure to put in that connection. I think it should be a substantially larger sum. I can't believe that is just compensation.

The Court: As I said there isn't a possibility of arriving at the proper figure of just compensation. If the case had been tried and defendant had won it there would be no such compensation. If the case should go on to another trial part of the time Counsel has spent will not be wasted. I admit it's more or less an arbitrary figure, picking the figures out of the air to arrive at it, but that's the figure I have arrived at and the order will read as I have indicated. It will be an order of dismissal [175] without prejudice with the condition precedent that the sum of \$250 shall be paid within forty five days, otherwise a judgment of dismissal with prejudice will be entered. The record will show defendant's motion is held in abeyance pending the payment by plaintiff to defendant the sum

of \$250 and defendant's motion will be granted unless the amount is paid.

Upon request of Counsel both sides were permitted by the Court to withdraw the exhibits introduced. [176]

State of Washington,
County of Spokane—ss.

I, J. J. Cole, Do Hereby Certify that I am the Court Reporter who reported the matters and proceedings occurring in the above entitled cause upon the trial thereof on April 28 and 29, 1942; that the above is an accurate transcription of such proceedings.

J. J. COLE

Court Reporter

[Endorsed]: Filed Dec. 21, 1942. [177]

PLAINTIFF'S EXHIBIT No. "A"
PACIFIC FRUIT AND PRODUCE CO.

Date	Geo. Brisky	Cont. No.	Branch			
	Ticket Number	Items	Packed Bxs. Credited	Debits	Principal Credits	Balance
Aug. 2	9534	Check	Balance from last statement	50.00		50.00
10	12233	6 gal Red drum 5 g Fish Oil 7 C's 8/6 Gras.		41.67		
10	12253	Recording Crop Mtg.		50		95.99
10	12359	2 gal Fish Oil 4 g Red drum		3.82		145.99
12	9585	Check		50.00		151.31
17	12348	4 g Fish Oil 4 g Red Drum		5.32		178.26
24	9642	Check—Floyd Williams		26.95		
24	7422	300 Bx shook—Less Tops—1 Keg 5½ Nail		40.81		255.07
24	7430	300 Bx shook—Less Tops		36.00		270.07
31	9743	Check		15.00		243.12
31	Jr	Trfd to John Brisky—ek #9642 to F Williams			26.95	
Sept 11	11469	3373 # Barts John Brisky			29.50	
11	11457	3376 # Barts John Brisky			35.46	
11	11488	1436 # Barts John Brisky			18.93	159.23St
11	9900	Check Geo		20.00		179.23
Oct 9	10607	Check Geo		35.00		214.23

Geo. Brisky—(Continued)			Branch.....			Principal Credits	Balance
Date	Ticket Number	Items	Packed Bxs. Credited	Debits			
1937							
Oct.	9	18711 500 box shook Less T @ 12¼ Schimttten.....		61.25			
	9	18707 400 Box shook Less T @ 12¼ Schmittten.....		49.00			324.48
	9	10826 Check		5.00			
	16	10858 Check		10.00			339.48
	16	18838 Pkg 479 Jons (1008 L Jons) 479 Tops.....		140.89			480.37
	16	37559 163 Jon culls 5542 #			11.08		469.29
	26	11245 Check Part Ck Bal B&W a/c 75.00.....		25.00			494.29
	30	18944 Packing 189 Debe (L.280) Tops. 12 boxes.....		51.60			
	30	24007 2 X F Jons.....		1.50			
	30	11398 Check		30.00			577.39
	30	37629 10 Face & Fill Jons.....			2.90		
	30	37624 1088# Delic Culls.....			1.09		573.40
						Fwd.	
						[178]	
						Interest	
						Da	
						Amount	
Oct	30		Balance from last statement				573.40
Oct	30	37630 102 # Jon culls.....				.15	573.25
Nov	10	16154 126 L. Spitz Washed.....		10.08			
	10	16151 Packing 241 Romes, Tops, 32 Washed Loose..		65.23			648.56

Geo. Brisky—(Continued)

Branch.....

Date	Ticket Number	Items	Packed Bxs. Credited	Debits	Principal Credits	Balance Da	Interest Amount
1937							
Nov.	10	37653 1088 # Spitz Culls.....			2.72		
	10	37659 2720 # Rome Culls.....			6.80		
	10	37654 2856 # Orch. Run Spitz.....			21.42	617.62	
Dec	11	35818 2414 # Sap Culls.....			2.41	615.21	
	11	Jr Trfd to Brisky & W a/c 1/2 Spray Material.....			25.40	589.81	
	18	16263 Packing 146 Saps (L. 361) Tops.....		45.79		635.60	
	18	24292 415 Ex "C" Fey Jons.....			207.23	428.37St.	
	24	37660 216 # Large Romes loose (6 Bx).....			1.58	426.79	
	24	35860 14 Ex Romes 180-175.....			8.26	418.53	
1938							
Jan	8	12442 189-Delic (92xF; 83 Fey, 14-c) less adv. stg..			135.64		
	8	4661 40xJons 234's (from Tkt 24 292).....			15.60		
	8	12588 146 Ex F&C Saps.....			78.90	188.39	
	8	Dk Trfd to Suspense.....			20.58	167.81St.	
	15	CM 500 New Boxes.....			65.00	102.81	
Feb	21	10321 227 Ex & F Romes.....			80.07		
	21	10323 32 small a Romes.....			55	22.19St42.77	
	28	10497 24 x Jons.....			6.96	St37.10	
	28	10496 Refund storage Teht # 12442.....			5.67	9.56St30.14	
	28	JR Trfd to Suspense.....			9.56	.....

[179]

PLAINTIFF'S EXHIBIT "B"
PACIFIC FRUIT AND PRODUCE CO.

Cont. No.

Branch.....

Geo. Brisky
Cashmere

Date	Ticket Number	Items	Packed Bxs. Credited	Debits	Principal Credits	Interest Balance Da Amount
1937			Balance from last statement			
Aug. 2	9534	Check		50.00		
10	12233	6g Red Drum 5g Fish Oil 7 C's 8/6 Gras.....		41.67		
10	12253	Recording Crop Mtg.....		.50		
10	12359	2 gal. Fish Oil 4g Red Drum.....		3.82		
12	9585	Check		50.00		
17	12348	4g Fish Oil 4g Red Drum.....		5.32		
24	9642	Check—Floyd Williams		26.95		
24	7422	300 Bx Shook—Less Tops 1 Keg 5 1/2.....		40.81		
24	7430	300 Bx Shook—Less Tops.....		36.00		
31	9743	Check		15.00		
31	J. R.	Tofd to John Brisky—ck #9642 to F. Williams			26.95	
Sept. 11	11469	3373 # Bants			29.50	
11	11457	3376 # Bants			35.46	
11	11488	1436 # Bants			18.93	

Geo. Brisky—Cashmere—(Continued)

Date	Ticket Number	Items	Packed Bxs. Credited	Debits	Principal Credits	Interest Balance Da Amount
1937						
Sept. 11	9900	Check—Geo.	.....	20.00		
Oct. 9	10607	Check—Geo.	.....	35.00		
9	18711	500 Bx Shook Less T @ 12¼ Schm.	.....	61.25		
9	18707	400 Bx Shook Less T @ 12¼ Schm.	.....	49.00		
9	10826	Check	.....	5.00		
16	10858	Check	.....	10.00		
16	18838	Pkg. 479 Jons (1008 L. Jons) 479 T	.....	140.89		
16	37559	163 Jon Culls 5542#	.....		11.08	
26	11245	Check	.....	25.00		
30	18944	Packing 189 Delic (L. 280) Tops 12 Bxs.	.....	51.60		
30	24007	2 Ex Jons	.....	1.50		
30	11398	Check	.....	30.00		
30	37629	10 F & F Jons	.....		2.90	
30	37624	1088# Delic Culls	.....		1.09	

[180]

Geo. Brisky—Cashmere—(Continued)

Date	Ticket Number	Items	Packed Bxs. Credited	Debits	Principal Credits	Balance Da	Interest Amount
1937						428.37	
Dec. 18		Balance from last statement.....			1.58		
11/1	37660	216# lg. Romes loose (6 Bx).....			8.26		
24	35860	14 X Romes—180s.....					
1938							
Jan. 8	12842	189 Delic (92XF, 83 Fcy, 14C) Less Adv. Stg.			135.64		
8	4661	40 X Jons—234s (from Tekt #24292).....			15.60		
8	12588	146 X, Fcy, & C Saps.....			78.90	188.39	
							[182]
1938							
Jan. 8		Balance from last statement.....		188.39	65.00		
15		500 boxes			80.07		
Feb. 21		227 Ex & F Romes.....			.55	42.77	
21		Small C Romes.....			5.67	37.10	
28		Additional on Delic.....			6.96	30.14	
28		24 X Jons 234s.....					[183]

PLAINTIFF'S EXHIBIT No. "C"

No. 37629

247

PACIFIC FRUIT & PRODUCE CO.

Produce Ticket

From Geo. Briskey

Date 10-27-37

Address.....

Buyer.....

10/30

Lot No.	Quantity	Articles	Weight	Price	Amount
	10	Face & Fill Jons		30	3.00
		Advertising			.10

 2.90

Received by C

In the absence of a written contract of purchase the produce covered by this receipt is to be handled for Grower's account, and Grower hereby gives Company the right to re-consign, to sell to Company's branches, or to the general trade.

Grower warrants his title to produce covered herein and guarantees it is free from Crop Mortgage or other lien.

[184]

PLAINTIFF'S EXHIBIT "D"

In Account With

PACIFIC FRUIT & PRODUCE CO.

Packers and Car Lot Shippers
Distributors

164

1

Geo. Briskey
Cashmere

May 28, 1938

Branch—Cashmere

Date	No. Boxes	Grade	Variety	Size	Price per box
10/27	10	Face & Fill	Jons		30
11/4		Bulk Spitz (Est 68 Boxes)			31¢
		(Storage)			
Dec. 18	47	Ex Jons 163 & Lgr.	+ 8¢		29.14)
" 18	252	Ex Jons 175-216	+ 8¢		131.04)
" 18	23	Fey Jons 163 & lgr	+ 8¢		11.98)
" 18	93	Fancy Jons 175-216	+ 8¢		39.20)
" 24	4	O. R. Romes (216#)			40 +
Nov. 26	14	Ex Romes 180-175			1.62
					8.40
Jan. 8	47	Ex Jons 163 & lgr (8B Delic)			45.59)
Jan. 8	45	Ex Jons 175-216	"		77
Jan. 8	34	Fey Jons 163 & lgr.	"		34.65)
					22.78)
					207. 3
					1.58
					8.26

Geo. Briskey—(Continued)

Date	No. Boxes	Grade	Variety	Size	Price per box
Jan. 8	49	Fey Jons 175-216	(8B Delic)	.....	57
Jan. 8	14	"C" Jons 163 & lgr	"	.....	47
Jan. 8	40	Ex Jons 234s	.....	.....	40
Jan. 8	(6	Ex Saps 163 & lgr	.....	.....	80)
Jan. 8	(42	Ex Saps 175-216	.....	.....	65
Jan. 8	(22	Ex Saps 234-252	.....	.....	50
Jan. 8	N(10	Fancy Saps 163 & lgr	.....	.....	65
Jan. 8	(28	Fancy Saps 175-216	.....	.....	50
Jan. 8	(37	Fancy Saps 234-252	.....	.....	40
Jan. 8	(1	"C" Saps 163	.....	.....	50
Feb. 15	82	Ex Romes 96-150	)	.....	42
Feb. 15	13	Ex Romes 163s	) N	.....	32
Feb. 15	98	Fey Romes 150 & lgr	)	.....	37
Feb. 15	34	Facy Romes 163-216	)	.....	22
Feb. 28	24	Ex Jons 234s	.....	.....	30

135.64

27.93)

6.58)

15.00

16.00

4.80

27.30)

11.00)

6.50)

14.00)

78.90

14.80)

.50)

34.44)

4.16)

36.26)

80.07

7.48)

7.20

6.96

[185]

PLAINTIFF'S EXHIBIT No. "E"

United States Department of Agriculture
Farm Security Administration

SUMMARY TRANSCRIPT OF ACCOUNT OF
GEORGE M. BRISKEY, 56-4-202-874

1936	Loan	
	Total Advances	\$630.00
	Amount of Repayments Applied to Principal up to October 31, 1939....	\$409.89
	Amount of Repayments Applied to Interest up to October 31, 1939.....	29.18
	Total Amount of Repayments to Oc- tober 31, 1939.....	439.07
1937	Loan	
	Total Advances	550.00
	Amount of Repayments up to Octo- ber 31, 1939.....	None.

On October 31, 1939, the balances due on the 1936 and 1937 loans were consolidated into a single renewal note. The status of the account since that date is as follows:

Amount of Repayments Applied to Principal since October 31, 1939....	\$ 44.00
Amount of Repayments Applied to Interest since October 31, 1939.....	70.00
Present Principal Balance on Com- bined 1936 and 1937 Loans.....	\$726.11
Interest on Combined 1936 and 1937 Loans accrued to April 25, 1942.....	107.46
Interest accrues on the combined 1936 and 1937 loans at the daily rate of \$.0995.	

#164

[186]

State of Oregon,
County of Multnomah—ss.

I, D. D. Oberle, being first duly sworn, depose and say that I am the Regional Finance and Business Manager of Region XI, of the Farm Security Administration, United States Department of Agriculture, that I have custody of and control over the accounts of the United States with respect to loans and advances made by the Resettlement Administration and its successor, the Farm Security Administration, and that the foregoing is a true, correct and complete summary transcript of the account maintained by me for loans and advances made during the years 1936 and 1937 to, and the repayments on such loans made by George M. Briskey.

/s/ D. D. OBERLE

Subscribed and sworn to before me this 27 day of April, 1942.

/s/ EDW. J. JOHNSON

[Seal] Notary Public for Oregon
My commission expires: 1-14-45. [187]

State of Oregon,
County of Multnomah—ss.

I, Walter A. Duffy, being first duly sworn, depose and say that I am the Regional Director of Region XI of the Farm Security Administration, United States Department of Agriculture, that D. D. Oberle is the Regional Finance and Business Manager of Region XI of the Farm Security Administration, United States Department of Agriculture, and that said D. D. Oberle has custody of and control over the accounts with respect to loans made by the Resettlement Administration and its successor, the Farm Security Administration.

/s/ WALTER A. DUFFY

Subscribed and sworn to before me this 27 day
of April, 1942.

/s/ EDW. J. JOHNSON

[Seal] Notary Public for Oregon

My commission expires: 1-14-45. [188]

DEFENDANT'S EXHIBIT "1"

Client: Geo. Brisky			Warehouse—Pacific			Cashmere		Date: 5/20					
Date	No. of Boxes	Variety	Grade	Size	Gross Price From Broker	Up to 60c per Box	Deductions	Balance per Box	Due FSA	Total Due FSA	Remarks		
10/27	10	Jonathans	F & F	all	60-		6.00	30	30	3.00			
11/ 4	68(Est)	Spitz(bulk)	All	"	31		21.08	31	—	—			
12/11	47	Jonathans	Ex	163/-	62		29.14						
"	252	"	"	175-216	52		131.04						
"	23	"	Fcy	163/1	52		11.96	60	—	—			
"	93	"	"	175-216	42		39.06						
12/24	4	Romes	Orchard	Run	40		1.60	60	—	—			
11/26	14	"	Ex	180-175	60		8.40	60	—	—			
1/ 8	47	Jons	"	163/-	97		45.59						
"	45	"	"	175-216	77		34.65						
"	34	"	Fcy	163/-	67		22.78	60	—	16.13			
"	49	"	"	175-216	57		27.93						
"	14	"	C	163/-	47		6.58						
"	40	"	Ex	234	40		16.00						

Client: Geo. Brisky—(Continued)

Date	No. of Boxes	Variety	Grade	Size	Gross Price From Broker	Deductions		Total Due FSA	Remarks
						Up to 60c per Box	Balance per Box Due FSA		
1/ 8	6	Winesaps	Ex	163/-	80	4.80			
"	42	"	"	175/216	65	27.30			
"	22	"	"	234/252	50	11.00	60		
"	10	"	Fey	163/-	65	6.50			
"	28	"	"	175-216	50	14.00			
"	37	"	"	234-252	40	14.80			
"	1	"	C	163	50	.50			
[189]									
						2 Date: 5/25			
2/15	82	Romes	Ex	96-150	42	34.44	60		
"	13	"	"	163	32	4.16	60		
"	98	"	Fey	150/-	37	36.26	60		
"	34	"	"	163-216	22	7.48	60		
2/28	24	Jonathans	Ex	234	30	7.20	60		
						570.25			

The figure indicated in the column "Gross Price from Broker" is the amount received before the deduction of any amounts for packing or storage charges, for inspection, insurance, advertising, or analysis costs, or for advances made to the grower for any other purpose.

Signed.....

[190]

DEFENDANT'S EXHIBIT "2"

United States Department of Agriculture
FARM SECURITY ADMINISTRATION
Wenatchee, Washington

June 1, 1938

Pacific Fruit & Produce Co.

To: Cashmere, Washington

Dear Sir:

The statement of account dated May 28, 1938 which you have submitted and indicating that you sold 1069 packed boxes of apples for our client, Geo. Brisky has been received and examined by this office.

It is assumed that the prices quoted as the prices received are the gross proceeds, that is, the amount received before the deduction of any amounts for packing or storage charges, for inspection, insurance, advertising, or analysis costs, or for advances made by you to the grower for any other purpose.

It is further assumed that the charges against each box of apples which you have made represent actual charges, in no instance exceeding the total sum of \$.60 per box for services or supplies furnished or for funds advanced for packing, storage, inspection, insurance, advertising, analysis, or for any of the purposed specifically mentioned in the subordination agreement executed by the United States Department of Agriculture, (Form RA-11 LE-7). Providing these assumptions are correct,

the amount of the proceeds which should be paid over to the United States after the deduction by you of all the charges which you are authorized to deduct pursuant to that subordination agreement is \$19.13, of which \$0 has been paid, leaving a balance of \$19.13. You are, therefore respectfully requested to make payment to the United States of this balance. Upon the payment of this sum a release of mortgage covering the apples heretofore sold by you and covered in the statement of account referred to. will be executed and delivered to the client or to you as you and the client may determine.

The amount determined to be due has, as indicated above, been computed upon the basis that the aforementioned assumptions are correct. It should be understood that if the amount of the proceeds of the sale of apples as set forth in the statement submitted by you does not represent the gross proceeds in any particular case, or if the charges for which deductions have been claimed by you and allowed by this office are in excess of the actual charges against the apples sold, the United States reserves and will assert any and all rights which it may otherwise have. Your remittance of the sum herein requested is understood to be upon this basis.

Very truly yours,

B. R. PHIPPS

County Supervisor

April 1942 Term

Wednesday April 29, 1942

14th day

Court Convened Pursuant to Adjournment, at
9:00 A.M.

Present: Honorable Lewis B. Schwellenbach, District Judge, A. A. LaFramboise, Clerk, Harvey Erickson, Assistant U. S. Attorney, R. R. Isaacs, Deputy U. S. Marshal.

PROCEEDINGS

No. 164

RECORD SECOND DAY OF TRIAL

[Title of Cause.]

Now on this 29th day of April, 1942, all parties being present in court, trial of this cause resumed. The following witnesses were sworn and testified on behalf of the plaintiff:

1. O. R. Barrett
2. B. R. Phipps
3. C. D. Raines
4. M. F. Schons

Plaintiff's Identification F—Withdrawn.

Plaintiff rested at 11:50 A.M.

Plaintiff then moved for voluntary non-suit without prejudice.

Defendant moved for dismissal of plaintiff's case with prejudice,—held in abeyance.

Plaintiff's motion Granted provided that payment in the sum of \$250.00 be made to defendants within forty-five days and if such payment is not made then dismissal with prejudice will be entered.

All exhibits withdrawn by the respective parties.

* * * * *

Thereupon Court adjourned until tomorrow April 30th, 1942, at 9:30 A.M. [192]

[Title of Court and Cause.]

ORDER OF DISMISSAL

This matter having come regularly on for trial before the undersigned Judge of the above entitled court, on the 28th day of April, 1942, upon the complaint of the plaintiff and the Answer of the defendant, and the plaintiff appearing in open court by Harvey Erickson, Assistant United States District Attorney, and the defendant appearing in open court by Howard W. Sanders, of the law firm of Ryan, Askren & Mathewson, and both parties having announced themselves ready for trial, and the plaintiff having introduced evidence in support of its complaint and having rested,

And it further appearing to the court that the plaintiff introduced no sufficient evidence in support of its complaint entitling it to a recovery,

And the plaintiff having moved for a voluntary Order of Dismissal without prejudice, and the defendant having moved for a dismissal with preju-

dice, and the court having heard the arguments and being fully advised in the premises,

And it appearing to the court that the defendant has necessarily expended considerable money in the preparation of its defense in the above entitled action,

Now Therefore, it is hereby ordered that if the plaintiff shall pay to the defendant within 45 days from this date the sum of \$250.00 to reimburse it for funds expended in the preparation of its defense, that the above entitled action will be dismissed without prejudice. If the plaintiff shall fail within said period of time from said date to make payment of \$250.00 then the above entitled action shall be dismissed with prejudice.

It Is Further Ordered that the plaintiff may withdraw from the files of the above entitled court plaintiff's exhibits B, C, D and E, and the defendant may withdraw from the files of the above entitled court plaintiff's A and the defendant's Exhibit 1 and 2.

Done in Open Court this 29th day of April, 1942.

L. B. SCHWELLENBACH

United States District Judge

Presented by:

HARVEY ERICKSON

Approved by:

HOWARD W. SANDERS

[Endorsed]: Filed April 29, 1942. [193]

[Title of Court and Cause.]

MOTION FOR DISMISSAL

Comes now the defendant and moves the court for an order dismissing the above entitled action with prejudice. This motion is based upon all the files, records and proceedings herein and the affidavit hereunto attached.

RYAN, ASKREN &

MATHEWSON

HOWARD W. SANDERS

State of Washington

County of King—ss.

Howard W. Sanders, being first duly sworn, on oath deposes and says:

That he is an attorney at law associated with Ryan, Askren & Mathewson and one of the attorneys for the defendant of the above entitled action. The above entitled court did on the 29th day of April, 1942, enter its certain order by the terms of which it specified that if the plaintiff failed to make a payment of \$250.00 to the defendant within forty-five days from the date of said order then the above entitled action would be dismissed with prejudice. The plaintiff has wholly failed to pay said sum of \$250.00 to the defendant. Affiant makes this affidavit in support of the defendant's motion for dismissal of the above entitled action with prejudice.

HOWARD W. SANDERS

Subscribed and Sworn to Before Me This 15
Day of June, 1942.

[Seal] JOHN E. RYAN, JR.

Notary Public in and for the State of Washington,
Residing at Seattle.

Copy Rec'd June 17, 1942.

HARVEY ERICKSON

Ass't U. S. Atty.

[Endorsed]: Filed June 25, 1942. [194]

[Title of Court and Cause.]

MOTION FOR CONTINUANCE OR FOR DIS-
MISSAL WITHOUT PREJUDICE

Comes now the plaintiff United States of America
by Edward M. Connelly, United States Attorney,
and Harvey Erickson, Assistant United States At-
torney for the Eastern District of Washington, and
under the authority and direction of the Attorney
General of the United States moves the Court for
an order continuing the above case to allow for
further introduction of evidence as to the market
value of the mortgaged fruit at the time of con-
version or, in the alternative, moves the Court for
an order dismissing the above-entitled action with-
out prejudice.

EDWARD M. CONNELLY

United States Attorney

HARVEY ERICKSON

Assistant United States

Attorney

[Endorsed]: Filed July 2, 1942. [195]

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come regularly on to be heard before the undersigned Judge of the above-entitled Court upon the 28th and 29th days of April, 1942, upon the complaint of the plaintiff and answer of the defendant, and the plaintiff appearing in open court by Harvey Erickson, Assistant United States Attorney, and the defendant appearing by Ryan, Askren & Mathewson and Howard W. Sanders, its attorneys, and the Court having directed that the parties try the third cause of action contained in the plaintiff's complaint and that the judgment rendered in said cause of action should be applicable to the other causes of action contained in plaintiff's complaint, and evidence having been introduced in behalf of the plaintiff, and the plaintiff having rested, and the Court having heard the evidence, and the plaintiff having moved for voluntary dismissal without prejudice, and the defendant having moved for dismissal with prejudice, and the said motions having been submitted to the Court, the Court, having heard the arguments and the evidence introduced and being fully advised in the premises, does make the following

FINDINGS OF FACT

I.

That the Farm Security Administration, formerly the Resettlement Administration, was and now is a

division, branch, and official Federal agency of the United States of America, duly created and authorized and empowered to act as such by Executive Order No. 7027 and Executive Order No. 7530, and by reason of said facts the United States of America is the real party in interest herein as plaintiff and the above-entitled Court has jurisdiction of this case.

II.

That the defendant Pacific Fruit and Produce Company is a corporation duly licensed and qualified to do business in the state of Washington, its principal place of business being located in the City of Seattle, Washington. [196]

III.

That between the dates of April 6, 1937, and June 15, 1937, the plaintiff advanced to George M. Brisky and Evelyn Brisky, husband and wife, of Route 1, Cashmere, Chelan County, Washington, hereinafter referred to as the borrowers, the sum of \$550.00; that in addition thereto the said George M. Brisky and Evelyn Brisky are indebted to the plaintiff in the sum of \$220.11 on account of the balance due on a loan made to them during the year 1936.

IV.

That between the dates of April 6, 1937, and June 15, 1937, the plaintiff advanced the sum of \$550.00 to the said George M. Brisky and Evelyn Brisky, who made, executed, and delivered to the

United States certain promissory notes in writing in the amounts of \$165.00, \$155.00, and \$230.00, dated April 6, 1937, April 22, 1937, and June 15, 1937, respectively; that on March 28, 1938, in consideration of the balance then due on the 1936 loan and to evidence their indebtedness therefor, the said George M. Brisky and Evelyn Brisky made, executed, and delivered to the United States a certain renewal promissory note in writing in the sum of \$220.11, dated March 28, 1938.

V.

That on or about April 9, 1937, in order to secure the repayment of the sum of \$795.00, which included the balance then due on the 1936 loan in the sum of \$630.00 and the sum of \$165.00 which had then been advanced to them, and to secure future advances in the sum of \$385.00, which are evidenced by their promissory notes, the said George M. Brisky and Evelyn Brisky executed and delivered to the plaintiff a certain crop and chattel mortgage, which crop and chattel mortgage was verified and acknowledged on April 9, 1937, and was thereafter on the same day filed in the office of the County Auditor of Chelan County, Washington, as Instrument No. 40456.

VI.

By said crop and chattel mortgage the plaintiff acquired a first lien on all fruit crops produced or to be produced by the said George M. Brisky and Evelyn Brisky during the year 1937 upon the following described [197] real property, to-wit:

Beginning at a point on the Section line between Sections 11 and 12, Township 23 N., Range 18, E. W. M., 800 ft. S. of the Govt. $\frac{1}{4}$ corner between aforesaid Sec. 11 and 12, running thence (corrected course) N. 57 51' E. to N. line of the NW $\frac{1}{4}$ of SW $\frac{1}{4}$ of said Sec. 12; thence E. to the NE corner of the NW $\frac{1}{4}$ of the SW $\frac{1}{4}$; thence S. to the SE corner of the NW $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Sec. 12, thence W. to the SW corner of the NW $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Sec. 12, thence running N. to the point of beginning. Excepting the following tract of land: beginning at the SE corner of the NW $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Sec. 12, thence running E. along the S line of said NW $\frac{1}{4}$ of SW $\frac{1}{4}$ a distance of 580 ft. to a stake; thence N. a distance of 196 ft. to a stake; thence E. 580 ft. to said E. line of said NW $\frac{1}{4}$; thence S. along the E line of said NW $\frac{1}{4}$ of SW $\frac{1}{4}$ to the place of beginning, containing $\frac{2}{6}$ acres, more or less.

Part of the SW $\frac{1}{4}$ of Sec. 12, Twp. 23 N., R. 18 E. W. M. described as follows, to-wit: Beginning at the NW corner of the SW $\frac{1}{4}$ of SW $\frac{1}{4}$, Sec. 12, Twp. 23 N., R. 18 E. W. M., and running S. 317 ft. to a stake; thence E. 740 ft. to a stake; thence N. 317 ft. to a stake; all of the above being in Chelan County, Washington

and the following described personal property:

2 white horses, 1-17 yrs., 1-12 yrs., 1600 lbs., each (approx.)

1 Jersey heifer, 1 yr., dark red, shading to black in color

1 Jersey cow, cream color, 7 yrs., horns "Boss" no ear tag

all chickens, approximately 40 Leghorns and Buff Orphingtons

23 hogs—5 sows white, 2 yrs., 1 blk boar, 2 yrs., 17 shoats, white and black, 6 months

1 Sterling pump, #6842

1 3 Hp. U. S. Motor, #106740

1 1 Hp. Sears Roebuck Motor

1 11¼" pump

1 200 gal. wood tank

1 12 gal. Haride pump

150 ft. (approx.) of 1¼" black pipe

1500 Ft. (approx.) of ¾" galv. spray pipe

Misc. orchard tools and equipment

1-20 tooth spike tooth harrow

1—2 shovel Oliver Ditcher, steel tongue, horse drawn

1—2 horse disc, 8 blade, steel hookings, no seat

1—4 wheel (steel) wagon, wood tongue

1 Spring tooth harrow

1 McCormick mower, wood tongue (spliced)

1 McCormick rake, 2x8 wood tongue

which first lien was an essential part of plaintiff's security for the repayment of the indebtedness of

the said George M. Brisky and Evelyn Brisky to the plaintiff.

VII.

That by virtue of the execution of said notes there now remains due and owing to the plaintiff on the principal of said notes the sum of \$770.11 with interest thereon at the rate of 5% per annum until paid. [198]

VIII.

That the funds advanced by the plaintiff to the said George M. Brisky and Evelyn Brisky were insufficient to finance the entire cost of producing and marketing the fruit crops to be produced on the above described real property during the year 1937 and additional funds were needed for such purposes; that arrangements were made between the borrowers and the defendant whereby the defendant proceeded to advance the additional funds required for the producing, handling, storage, and marketing of the said fruit crops and for the rendering of necessary services by the defendant in connection therewith.

IX.

That the terms and arrangements by which the defendant advanced money to the borrowers for the completion of services in connection with the 1937 fruit crops were that the defendant obtain a crop mortgage or other lien which would be a first and prior lien to all other liens upon the fruit crops to be produced by the said borrowers during the year 1937 upon the real property above described to

secure the repayment of the funds advanced by the defendant to finance the additional costs of producing, handling, storage, and marketing the said fruit crops.

X.

That the plaintiff executed a subordination agreement subordinating the lien of the crop and chattel mortgage in favor of the plaintiff upon the fruit crops to be produced by the said borrowers on the above described real property during the year 1937 to crop mortgages or other liens upon such fruit crops to be created in favor of the defendant to secure repayment to the defendant of sums advanced to said borrowers to finance the additional cost of producing, handling, and marketing the said fruit crops.

XI.

That the plaintiff then executed a limited subordination agreement, by the terms of which agreement the plaintiff subordinated, to the extent set forth in said agreement, the lien of the crop and chattel mortgage in favor of the plaintiff upon the fruit crops to be produced during 1937 by the borrowers upon the above described real property to any and all liens [199] thereafter created in favor of the defendant to secure the repayment of funds advanced to the borrowers or charges incurred for services in connection with the producing, handling, and marketing of the said 1937 fruit crops, the terms of which subordination agreement

provide that plaintiff's crop and chattel mortgage above described shall be subordinated to any and all liens upon the mortgagors' fruit crops for the year 1937 thereafter created by the said mortgagors in favor of the defendant to secure said loan; provided, however, that such subordination shall be limited to the extent of 60 cents per box on all fruit sold by the mortgagors and does specifically agree that the defendant shall have the right to deduct and receive from the sales made by the said mortgagors of their 1937 fruit crops the sum of 60 cents per box from each sale made by them until the loan made by the defendant shall have been paid in full and that the United States shall have a first lien upon all proceeds from each and every sale of any part of the mortgagors' 1937 fruit crops after the deduction of 60 cents per box from the proceeds of each sale has been made by the defendant.

XII.

That thereafter the defendant proceeded to advance funds and render services as were needed by the said borrowers George M. Brisky and Evelyn Brisky to aid them in financing such additional costs as were involved in producing, handling, and/or marketing the fruit crops produced during 1937 by the borrowers on the above described real property.

XIII

That thereafter the defendant received from the borrower 1,137 boxes of apples, of which apples

the defendant converted to its own use 298 boxes as follows:

No. of Boxes	Size	Grade	Variety	Date
30	234	F	Winesap	1-22-38
48	56-150	XF	Delicious	2- 1-38
26	125-150		½ Winesap; ½ Del.	2-10-38
6	all	XF	Delicious	3- 2-38
46	138-163		Romes	2-10-38
3		C	Delicious	3- 2-38
5	130-165	F	Romes	3- 2-38
7		C	Delicious	3- 5-38
12	163	XF	Delicious	3- 5-38
8	Medium	F	Delicious	3-12-38
2	88-96	F	Winesap	3-10-38
				[200]
4	163	XF	Winesap	3-24-38
11	163 & smaller	XF	Delicious	4-13-38
25	216	F	Delicious	4-20-39
30		XF	Romes	3- 3-38
14	143 & larger	XF	Delicious	2-26-38
21		C		3-16-38

and that there was no proof submitted as to whether or not defendant converted any of the remaining boxes of apples.

XIV

No proof was submitted as to the value of the fruit converted by the defendant.

Dated this 6th day of July, 1942.

L. B. SCHWELLENBACH,
United States District Judge.

Presented by

HOWARD W. SANDERS,
Attorney for Defendant.

From the foregoing Findings of Fact and evidence introduced, the Court makes the following

CONCLUSIONS OF LAW

That the above-entitled action should be dismissed with prejudice.

Dated this 6th day of July, 1942.

L. B. SCHWELLENBACH,
United States District Judge.

Presented by

HOWARD W. SANDERS,
Attorney for Defendant.

Copy received this 6th day of July, 1942.

HARVEY ERICKSON,
Assistant United States At-
torney.

[Endorsed]: Filed July 6, 1942. [201]

In the District Court of the United States for the
Eastern District of Washington, Northern Di-
vision.

No. 164

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PACIFIC FRUIT & PRODUCE COMPANY, a
corporation,

Defendant.

JUDGMENT OF DISMISSAL

This matter having come regularly on to be heard before the undersigned Judge of the above-entitled Court upon the 28th and 29th days of April, 1942, upon the complaint of the plaintiff and answer of the defendant, and the plaintiff appearing in open court by Harvey Erickson, Assistant United States Attorney, and the defendant appearing by Ryan, Askren & Mathewson and Howard M. Sanders, its attorneys, and the Court having directed that the parties try the third cause of action contained in the plaintiff's complaint and that the judgment rendered in said cause of action should be applicable to the other causes of action contained in the plaintiff's complaint, and evidence having been introduced in behalf of the plaintiff, and the plaintiff having rested, and the Court having heard the evidence, and the plaintiff having moved for voluntary dismissal without prejudice and the defendant having moved for dismissal with prejudice,

and the said motions having been submitted to the Court, the Court having heard the arguments and the evidence introduced and being fully advised in the premises. and having heretofore entered its Findings of Fact and Conclusion of Law, and it appearing to the Court that the Court did heretofore on the 29th day of April, 1942, enter its preliminary order, and plaintiff having failed to comply with such order by reimbursing defendant in the sum of \$250.00; Now, Therefore, it is hereby

Ordered that the above-entitled action be, and the same hereby is, dismissed with prejudice.

Approved. Clerk is directed to enter.

Dated this 6th day of July, 1942.

L. B. SCHWELLENBACH,
United States District Judge.

Presented by:

HOWARD W. SANDERS,
Attorney for Defendant.

Copy received this 6th day of July, 1942.

HARVEY ERICKSON,
Assistant United States At-
torney.

[Endorsed]: Filed July 6, 1942. [202]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit

from the final judgment in this case dated July 6, 1942.

EDWARD M. CONNELLY,
United States Attorney.

HARVEY ERICKSON,
Assistant United States At-
torney.

Copy mailed to Ryan, Askren & Mathewson Sept.
30, 1942.

A. A. LaFRAMBOISE,
Clerk. [203]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR DOCKET-
ING RECORD ON APPEAL

It appearing to the court that it will be impos-
sible for the plaintiff-appellant, United States of
America, to have its record on appeal docketed
within forty days from September 30, 1942, it
is therefore

Ordered that pursuant to Rule 73g of the Rules
of Civil Procedure, that the time for filing the rec-
ord on appeal and docketing the action with the
Clerk of the Circuit Court of Appeals is extended
to a time not more than ninety days from the date
of the filing of the first notice of appeal or until
December 29, 1942.

Dated this 30 day of October, 1942.

L. B. SCHWELLENBACH,
United States District Judge.

[Endorsed]: Filed Oct. 30, 1942. [204]

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 164

UNITED STATES OF AMERICA,

Appellant,

vs.

PACIFIC FRUIT & PRODUCE COMPANY, a
corporation,

Appellee.

ORDER EXTENDING TIME FOR FILING
TRANSCRIPT OF RECORD

This matter coming on before the undersigned, one of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, and it appearing to the said Judge that it will be impossible for the Appellant, the United States of America, to file its transcript of record within the ninety day extension of time affixed by the trial Judge, which expires December 29, 1942, and that the delay was not due to the negligence of the Appellant; that said extension is necessary to protect the rights of the Appellant, it is therefore

Ordered that the Appellant have until January 10, 1943, in order to file its transcript of record in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 24 day of December, 1942.

CURTIS D. WILBUR,

United States Circuit Judge.

Filed in the U. S. District Court, Eastern Dist.
of Washington, Dec. 26, 1942.

A. A. LaFRAMBOISE,
Clerk.

[Endorsed]: Filed Dec. 24, 1942.

PAUL P. O'BRIEN,
Clerk.

A true copy.

Attest: Dec. 24, 1942.

[Seal] PAUL P. O'BRIEN,
Clerk. [205]

In the District Court of the United States for the
Eastern District of Washington, Northern Di-
vision.

No. 164

UNITED STATES OF AMERICA,
Plaintiff,
vs.

PACIFIC FRUIT & PRODUCE COMPANY, a
corporation,
Defendant.

STATEMENT OF POINTS UPON WHICH AP-
PELLANT INTENDS TO RELY UNDER
RULE 19 (CAA 9)

Comes now the plaintiff, United States of Amer-
ica, and hereby makes this concise statement of the
points upon which it intends to rely on appeal.

1. The District Court lacked authority to condition the right of the United States to dismiss its action without prejudice upon the payment of the sum of \$250.00 as reimbursement to the defendant for the costs incurred in the preparation of its defense.

2. The District Court erred in dismissing the complaint of the United States with prejudice because of its failure to pay the sum of \$250.00 to the defendant.

3. The District Court erred in failing to enter judgment for the United States after it had been established that the defendant had been guilty of conversion.

4. The District Court erred in finding that 298 boxes of apples only had been converted.

5. The District Court erred in excluding the evidence which the United States submitted and offered for the purpose of establishing a market value of the apples so converted.

6. The District Court erred in dismissing all causes of action of the complaint though a hearing had been conducted only in respect to the third cause of action thereof.

7. The District Court erred in entering judgment for the defendant.

8. The District Court erred in failing to cause the defendant to produce the complete records as to the sale and disposition of the fruit as called for in the subpoena issued by the plaintiff.

The entire record has been designated by the appellant to be printed.

EDWARD M. CONNELLY,

United States Attorney.

HARVEY ERICKSON,

Assistant United States At-
torney. [206]

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF RECORD
TO CONSTITUTE RECORD ON APPEAL

Comes now the plaintiff, United States of America and hereby designates the portions of the record, proceedings and evidence to be contained in the record on appeal in the above-entitled cause, to-wit:

Amended Complaint (Third Cause of Action and Prayer)

Motion to Dismiss Amended Complaint

Order Denying Motion to Dismiss Amended Complaint

All exhibits pertaining to the Third Cause of Action

Exhibits No. 11, 12, 13, 14, 15 and 16

Clerk's minutes at time of trial showing Third Cause of Action only to be tried.

Answer of Defendant.

Plaintiff's Motion for Dismissal without Prejudice

Defendant's Motion for Dismissal with Prejudice

Order of Dismissal, April 29, 1942

Motion for Final Dismissal

Plaintiff's Motion for Continuance or for Dismissal without Prejudice

Findings of Fact and Conclusions of Law

Final Order of Dismissal

Notice of Appeal

Order extending time for Filing Transcript of Record

Designation of Portions of Record to Constitute Record on Appeal

Statement of Points to be Relied upon

Transcript of testimony

EDWARD M. CONNELLY,

United States Attorney.

HARVEY ERICKSON,

Assistant United States Attorney.

[Endorsed]: Filed Dec. 22, 1942. [207]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD

United States of America,

Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify the foregoing type-written pages numbered from 1 to 207 inclusive, to be a full, true, correct and complete copy of

so much of the record, papers and all other proceedings in the above entitled cause, as are necessary to the hearing of the appeal therein in the United States Circuit Court of Appeals, as called for by the appellant in his Designation of Record on Appeal, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal from the Judgment of Dismissal of the District Court of the United States for the Eastern District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Spokane in said District, this 6th day of January, 1943.

[Seal]

A. A. LaFRAMBOISE,
Clerk, U. S. District Court.

[Endorsed]: No. 10340. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Pacific Fruit & Produce Company, a Corporation, Appellee, Transcript of Record Upon Appeal from the District Court of the United States for the Eastern District of Washington, Northern Division.

Filed January 9, 1943.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 10340

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,

vs.

PACIFIC FRUIT & PRODUCE COMPANY, a
Corporation,
Appellee.

SUPPLEMENTAL
Transcript of Record

Upon Appeal from the District Court of the United States
for the Eastern District of Washington
Northern Division

In the District Court of the United States for the
Eastern District of Washington, Northern Di-
vision.

No. 164

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PACIFIC FRUIT & PRODUCE COMPANY, a
corporation,

Defendant.

SUPPLEMENTAL STATEMENT OF POINTS
UPON WHICH APPELLANT INTENDS
TO RELY UNDER RULE 19 (CAA 9).

Comes now the plaintiff, United States of America, and hereby makes this supplemental statement of the points upon which it intends to rely on appeal.

9. The District Court, after entering findings of fact which disclosed that the United States was entitled to have entered a judgment at least for nominal damages, erred in sustaining the defendant's motion to dismiss the complaint with prejudice.

10. The District Court erred in holding, in an action which was basically one for an accounting, that the burden was on the United States rather

than upon the defendant, to establish the prices for which the apples had been sold.

EDWARD M. CONNELLY,

United States Attorney.

HARVEY ERICKSON,

Assistant United States At-
torney.

[Endorsed]: Filed Jan. 12, 1943.

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL

United States of America,
Eastern District of Washington—ss.

Evelyn Gerhauser, being first duly sworn, upon oath, deposes and says:

That she is now and was at all times hereinafter mentioned a citizen of the United States and of the State of Washington, over the age of 21 years; that on January 12th, 1943, by regular mail she sent full, true and correct copies of the attached Supplemental Statement of Points Upon Which Appellant Intends to Rely under Rule 19 (CAA 9) and Supplemental Designation of Record on Appeal in the above entitled cause to Howard Sanders, one of the attorneys for the Appellee, Pacific Fruit & Produce Company, a corporation, by depositing such copies in the United States Mail in the Postoffice at Spokane, Washington, on said date in a franked envelope not requiring postage, di-

rected to said Howard Sanders, White-Henry-Stuart Building, Seattle, Washington, there being regular communication by mail at said time between Spokane and Seattle, Washington.

[Seal] EVELYN GERHAUSER

Subscribed and sworn to before me this 12th day of January, 1943.

EVA M. HARDIN,

Deputy Clerk, United States District Court, Eastern District of Washington.

[Endorsed]: Filed Jan. 12, 1943.

[Title of District Court and Cause.]

SUPPLEMENTAL DESIGNATION OF
RECORD ON APPEAL

To the Clerk of the above entitled Court:

You are hereby requested to forward to the Circuit Court of Appeals as a Supplemental Record on Appeal, the following:

1. Supplemental Statement of Points upon which Appellant Intends to Rely under Rule 19 (CAA 9) with Affidavit of Mailing.

2. This additional Supplemental Designation of Record on Appeal.

EDWARD M. CONNELLY,
United States Attorney.

HARVEY ERICKSON,
Assistant United States At-
torney.

United States of America

Eastern District of Washington—ss:

I, A. A. LaFramboise, Clerk of the United States District Court in and for the Eastern District of Washington, do hereby certify that the annexed and foregoing is a true and full copy of the original Supplemental Statement of Points upon which Appellant intends to rely under Rule 19 (CAA 9), Affidavit of Service by mail, and Supplemental Designation of Record on Appeal, in Cause No. 164, United States of America, Plaintiff, vs. Pacific Fruit & Produce Company, a corporation, and that the same constitutes the Supplemental Record on Appeal as called for by the Plaintiff in its Supplemental Designation of Record on Appeal in said cause, now remaining among the records of the said Court in my office, at Spokane, Washington.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Spokane this 12th day of January, A. D. 1942.

[Seal] A. A. LaFRAMBOISE
Clerk.

[Endorsed]: Filed Jan. 12, 1943.

